



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92451; File No. 4-698]

Joint Industry Plan; Order Instituting Proceedings to Determine Whether to Approve or Disapprove an Amendment to the National Market System Plan Governing the Consolidated Audit Trail

July 20, 2021.

I. Introduction

On March 31, 2021, the Operating Committee for Consolidated Audit Trail, LLC (“CAT LLC” or the “Company”), on behalf of the following parties to the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”):¹ BOX Exchange LLC; Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc. (“FINRA”), Investors Exchange LLC, Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MEMX, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the “Participants,” “self-regulatory organizations,” or “SROs”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (“Exchange Act”),² and Rule 608 thereunder,³ a proposed

¹ The CAT NMS Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. See Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016).

² 15 U.S.C 78k-1(a)(3).

³ 17 CFR 242.608.

amendment (“Proposed Amendment”) to the CAT NMS Plan to implement a revised funding model (“Proposed Funding Model”) for the consolidated audit trail (“CAT”) and to establish a fee schedule for Participant CAT fees in accordance with the Proposed Funding Model (“Participant Fee Schedule”). The Proposed Amendment was published for comment in the Federal Register on April 21, 2021.⁴

This order institutes proceedings, under Rule 608(b)(2)(i) of Regulation NMS,⁵ to determine whether to disapprove the Proposed Amendment or to approve the Proposed Amendment with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment.

II. Background

On July 11, 2012, the Commission adopted Rule 613 of Regulation NMS, which required the SROs to submit a national market system (“NMS”) plan to create, implement and maintain a consolidated audit trail that would capture customer and order event information for orders in NMS securities.⁶ On November 15, 2016, the Commission approved the CAT NMS Plan.⁷ Under the CAT NMS Plan, the Operating Committee of the Company, of which each Participant is a member, has the discretion (subject to the funding principles set forth in the Plan) to establish funding for the Company to operate the CAT, including establishing fees to be paid by the Participants and Industry Members.⁸

⁴ See Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail, Release No. 91555 (April 14, 2021), 86 FR 21050 (“Notice”). Comments received in response to the Notice can be found on the Commission’s website at <https://www.sec.gov/comments/4-698/4-698-a.htm>.

⁵ 17 CFR 242.608(b)(2)(i).

⁶ 17 CFR 242.613.

⁷ See supra note 1.

⁸ The CAT NMS Plan defines “Industry Member” as “a member of a national securities exchange or a member of a national securities association.” See CAT NMS Plan, supra note 1, at Section 1.1. See also id. at Section 11.1(b).

The Plan specified that, in establishing the funding of the Company, the Operating Committee shall establish “a tiered fee structure in which the fees charged to: (1) CAT Reporters⁹ that are Execution Venues,¹⁰ including ATs,¹¹ are based upon the level of market share; (2) Industry Members’ non-ATS activities are based upon message traffic; and (3) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members).”¹² Under the Plan, such fees are to be implemented in accordance with various funding principles, including an “allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company resources and operations” and the “avoid[ance of] any disincentives such as placing an inappropriate burden on competition and reduction in market quality.”¹³

On May 15, 2020, the Commission adopted amendments to the CAT NMS Plan designed to increase the Participants’ financial accountability for the timely completion of the CAT (“Financial Accountability Amendments”).¹⁴ The Financial Accountability Amendments added Section 11.6 to the CAT NMS Plan to govern the recovery from Industry Members of any fees,

⁹ The CAT NMS Plan defines “CAT Reporter” as “each national securities exchange, national securities association and Industry Member that is required to record and report information to the Central Repository pursuant to SEC Rule 613(c).” Id. at Section 1.1.

¹⁰ The CAT NMS Plan defines “Execution Venue” as “a Participant or an alternative trading system (‘ATS’) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).” Id.

¹¹ Id.

¹² Id. at Section 11.2(c). See Article XI of the CAT NMS Plan for additional detail.

¹³ See CAT NMS Plan, supra note 1, at Section 11.2(b) and (e).

¹⁴ See Securities Exchange Act Release No. 88890, 85 FR 31322 (May 22, 2020).

costs, and expenses (including legal and consulting fees, costs and expenses) incurred by or for the Company in connection with the development, implementation and operation of the CAT from June 22, 2020 until such time that the Participants have completed Full Implementation of CAT NMS Plan Requirements¹⁵ (“Post-Amendment Expenses”). Section 11.6 establishes target deadlines for four critical implementation milestones (Periods 1, 2, 3 and 4)¹⁶ and reduces the amount of fee recovery available to the Participants if these deadlines are missed.¹⁷

On April 21, 2021, the Nasdaq and Cboe Participants¹⁸ filed proposed rule changes to adopt a fee schedule to establish CAT fees applicable to their Industry Members¹⁹ in accordance

¹⁵ “Full Implementation of CAT NMS Plan Requirements” means “the point at which the Participants have satisfied all of their obligations to build and implement the CAT, such that all CAT system functionality required by Rule 613 and the CAT NMS Plan has been developed, successfully tested, and fully implemented at the initial Error Rates specified by Section 6.5(d)(i) or less, including functionality that efficiently permits the Participants and the Commission to access all CAT Data required to be stored in the Central Repository pursuant to Section 6.5(a), including Customer Account Information, Customer-ID, Customer Identifying Information, and Allocation Reports, and to analyze the full lifecycle of an order across the national market system, from order origination through order execution or order cancellation, including any related allocation information provided in an Allocation Report. This Financial Accountability Milestone shall be considered complete as of the date identified in a Quarterly Progress Report meeting the requirements of Section 6.6(c).” See CAT NMS Plan, *supra* note 1, at Section 1.1.

¹⁶ *Id.* at Section 11.6(a)(i).

¹⁷ *Id.* at Section 11.6(a)(ii) and (iii).

¹⁸ Cboe BYX Exchange, Inc. (“CboeBYX”), Cboe BZX Exchange, Inc. (“CboeBZX”), Cboe C2 Exchange, Inc. (“C2”), Cboe EDGA Exchange, Inc. (“Cboe EDGA”), Cboe EDGX Exchange, Inc. (“Cboe EDGX”), Cboe Exchange, Inc. (“Cboe”), NASDAQ BX, Inc. (“BX”), Nasdaq GEMX, LLC (“GEMX”), Nasdaq ISE, LLC (“ISE”), Nasdaq MRX, LLC (“MRX”), NASDAQ PHLX LLC (“Phlx”), The NASDAQ Stock Market LLC (“Nasdaq”) (collectively, the “Nasdaq and Cboe Participants”).

¹⁹ See Securities Exchange Act Release Nos. 91750 (May 4, 2021), 86 FR 25045 (May 10, 2021) (SR-BX-2021-018) (“Proposed Fee Filing Notice”); 91751 (May 4, 2021), 86 FR 24941 (May 10, 2021) (SR-PHLX-2021-25); 91752 (May 4, 2021), 86 FR 24921 (May 10, 2021) (SR-NASDAQ-2021-029); 91753 (May 4, 2021), 86 FR 24994 (May 10, 2021) (SR-MRX-2021-05); 91755 (May 4, 2021), 86 FR 25035 (May 10, 2021) (SR-ISE-2021-08); 91756 (May 4, 2021), 86 FR 24979 (May 10, 2021) (SR-GEMX-2021-03); 91757 (May 4, 2021), 86 FR 24911 (May 10, 2021) (SR-C2-2021-008); 91758 (May 4, 2021), 86 FR 25004 (May 10, 2021) (SR-CboeEDGX-2021-024); 91759 (May 4, 2021), 86 FR 24956 (May 10, 2021) (SR-CboeEDGA-2021-010); 91760 (May 4, 2021), 86 FR 24966 (May 10, 2021) (SR-CBOE-2021-030); 91761 (May 4, 2021), 86 FR 25016 (May 10,

with the Proposed Funding Model (the “Industry Member Fee Filings”). In the Industry Member Fee Filings, the Nasdaq and Cboe Participants stated that the fee schedule provisions will become operative upon the Commission’s approval of the Proposed Amendment. On June 17, 2021, the Commission temporarily suspended the Nasdaq and Cboe Participants’ Industry Member Fee Filings and instituted proceedings to determine whether those filings should be approved or disapproved.²⁰

III. Summary of Proposal

Under the Proposed Amendment, the Operating Committee proposes to revise certain aspects of the funding model set forth in Article XI of the CAT NMS Plan (the “Original Funding Model”). The Original Funding Model uses a bifurcated funding approach in which costs associated with building and operating the CAT would be borne by (1) Industry Members (other than ATs that execute transactions in Eligible Securities²¹ (“Execution Venue ATs”)) through fixed tiered fees based on message traffic for Eligible Securities, and (2) Participants and Industry Members that are Execution Venue ATs for Eligible Securities through fixed tiered fees based on market share. The Operating Committee proposes to amend the CAT NMS Plan to adopt the Proposed Funding Model. The Proposed Funding Model would continue to require many of the same elements as the Original Funding Model, including the bifurcated funding approach, and the use of market share and message traffic.²² The Proposed Funding Model,

2021) (SR-CboeBYX-2021-011); and 91762 (May 4, 2021), 86 FR 24931 (May 10, 2021) (SR-CboeBZX-2021-034).

²⁰ See Securities Exchange Act Release No. 92207 (June 17, 2021), 86 FR 33448 (June 24, 2021).

²¹ The CAT NMS Plan defines “Eligible Securities” as including NMS securities and OTC Equity Securities.” See CAT NMS Plan, supra note 1, at Section 1.1.

²² In the description of the Proposed Amendment, the Operating Committee states that message traffic will be calculated based on Industry Members’ Reportable Events reported to the CAT, as defined in the CAT Reporting Technical Specifications for Industry Members (“IM Reporting Tech Specs”), and that Reporting Events in the current IM Reporting Tech Specs that will be counted as message traffic include the New Order Event, the Order Route Event and Trade Event, but will not include reporting activity

however, would revise the Original Funding Model in certain ways, including (1) dividing the CAT costs between Participants and Industry Members, rather than between Execution Venues and Industry Members (other than Execution Venue ATSS); (2) removing share volume in OTC Equity Securities from the calculation of market share for national securities associations; (3) eliminating the use of tiers in calculating CAT fees for Participants and Industry Members; (4) removing from the CAT NMS Plan funding principles the requirement that the fees charged to CAT Reporters with the most CAT-related activity be generally comparable; (5) eliminating references to fixed fees for Participants and Industry Members; (6) adopting certain minimum and maximum CAT fees for Industry Members and Participants; and (7) imposing certain discounts for market making activity when calculating Industry Member CAT fees.

The Operating Committee also proposes to adopt a fee schedule to establish the CAT fees applicable to Participants based on the Proposed Funding Model. The Participant Fee Schedule would establish the allocation percentages and other variables for calculating the CAT fees under the Proposed Funding Model.

A. Proposed Funding Model

1. Categorization of Alternative Trading Systems

The Original Funding Model employs a bifurcated approach in which costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venue ATSS for Eligible Securities through fees based on market share, and (2) Industry Members (other than Execution Venue ATSS) through fees based on message traffic. Under the Proposed Funding Model, the concept of an Execution Venue would be eliminated, and CAT costs would be divided between Participants as a group and Industry Members as a group; Execution Venue ATSS would be treated like other Industry Members, instead of like

related to Customer information as established in the CAT Reporting Customer and Account Technical Specifications for Industry Members. The Operating Committee notes that the Reportable Events may vary if the IM Reporting Tech Specs are amended. See Notice, supra note 4, at 21056–21057.

Participants.²³ The Operating Committee explains that this would simplify the Proposed Funding Model by requiring all Industry Members (instead of Industry Members other than Execution Venue ATSs) to pay fees based on message traffic and would address any concerns that treating Execution Venue ATSs as Participants would create a barrier to entry for smaller ATSs.²⁴ Accordingly, under the Proposed Amendment, the Operating Committee proposes to delete the definition of the term “Execution Venue” and related provisions from the CAT NMS Plan.²⁵

2. Treatment of OTC Equity Securities

The Original Funding Model includes reported share volume in OTC Equity Securities in the calculation of market share for national securities associations.²⁶ The Operating Committee proposes to delete references to OTC Equity Securities from Section 11.3(a)(i) of the CAT NMS Plan. Accordingly, under the Proposed Funding Model, the calculation of market share for national securities associations would be based solely on the share volume of trades reported in NMS Stocks.²⁷ The Operating Committee explains that the inclusion of OTC Equity Securities share volume in the calculation of market share would likely subject FINRA to higher fees since FINRA would be assessed CAT fees based on market share calculated by share volume, noting that many OTC Equity Securities are priced below one dollar and transactions in such OTC Equity Securities tend to involve larger quantities of shares than transactions in NMS Stocks.²⁸

²³ Id. at 21053.

²⁴ Id.

²⁵ Id.

²⁶ Id. at 21061.

²⁷ Id.

²⁸ See Notice, supra note 4, at 21061.

3. No Tiered Fees

The Original Funding Model requires the use of tiered fees for Industry Members and Participants.²⁹ The Operating Committee proposes to amend Sections 11.1(d), 11.2(c), 11.3(a) and 11.3(b) of the CAT NMS Plan to eliminate the concept of tiered fees from the CAT NMS Plan.³⁰ Accordingly, under the Proposed Funding Model, each Industry Member would pay a fee based on its percentage of total Industry Member message traffic (subject to proposed market maker message traffic discounts,³¹ a minimum fee³² and a maximum fee³³), and each Participant would pay a fee based on market share.³⁴ The Operating Committee believes that tiered fees require continued reassessment of changes in message traffic, and that these assessments would be subjective and overly complex.³⁵

4. Elimination of Fee Comparability Requirement from the CAT NMS Plan Funding Principles

Section 11.2(c) of the CAT NMS Plan requires the Operating Committee to establish a fee structure in which the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable. Section 11.2(c) explains that for comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters. The Operating Committee proposes to remove this requirement from Section 11.2(c) of the Plan. According to the Operating Committee, the comparability provision was used to determine tiers under the Original

²⁹ Id. at 21055, 21060.

³⁰ Id.

³¹ See infra Section III.A.7.

³² See infra Section III.A.6.a.

³³ Id.

³⁴ See Notice, supra note 4, at 21055, 21060.

³⁵ Id. at 21056. The Operating Committee notes that it is eliminating tiered fees for Participants for the same reasons it provided with regard to eliminating tiered fees for Industry Members. Id.

Funding Model; however, since the Operating Committee proposes to remove fee tiering from the Proposed Funding Model,³⁶ they believe this provision is no longer relevant.³⁷

5. No Fixed Fees

The Operating Committee proposes to amend Sections 11.3(a) and (b) of the Plan to eliminate references to “fixed fees” to be paid by Industry Members and Participants from the CAT NMS Plan.³⁸ Accordingly, under the Proposed Funding Model, the CAT fees to be paid by Industry Members would vary in accordance with their message traffic and the CAT fees to be paid by the Participants would vary in accordance with their market share.³⁹

6. Minimum and Maximum Fees

a. Minimum and Maximum Industry Member CAT Fees

The Operating Committee proposes to amend Section 11.3(b) of the CAT NMS Plan to provide that each Industry Member would be subject to a base minimum Industry Member CAT fee (“Minimum Industry Member CAT Fee”) and a maximum Industry Member CAT fee (“Maximum Industry Member CAT Fee”).⁴⁰ In the Participants’ description of the Proposed Amendment, the Operating Committee states that the Minimum Industry Member CAT Fee would be \$125 per quarter for an Industry Member whose CAT fee would be less than \$125 per quarter, even if it has not yet begun to report to the CAT.⁴¹ If any Industry Member is required to pay the Minimum Industry Member CAT Fee, the total additional amount paid by all such Industry Members over the amount they otherwise would have paid as a result of their message traffic calculation would be discounted from all Industry Members other than those that were subject to a Minimum Industry Member CAT Fee in accordance with their message traffic

³⁶ See supra Section III.A.3.

³⁷ See Notice, supra note 4, at 21056.

³⁸ Id. at 21059, 21062.

³⁹ Id.

⁴⁰ Id. at 21058.

⁴¹ Id.

percentage (“Minimum Industry Member CAT Fee Re-Allocation”).⁴² The Operating Committee explains that the Minimum Industry CAT Fee is intended to ensure that all Industry Members meaningfully contribute to the funding of the CAT.⁴³

The Operating Committee also states that the Maximum Industry Member CAT Fee would be the fee calculated based on 8% of the total message traffic for Industry Members.⁴⁴ If an Industry Member’s fee is subject to the Maximum Industry Member CAT Fee, any excess amount which the Industry Member would have paid as a fee above such Maximum Industry Member CAT Fee will be re-allocated among all Industry Members (including any Industry Members subject to the Maximum Industry Member CAT Fee and any Industry Members subject to the Minimum Industry Member CAT Fee) in accordance with their percentage of total message traffic (“Maximum Industry Member CAT Fee Re-Allocation”).⁴⁵ The Operating Committee explains that the Maximum Industry Member CAT Fee is intended to act as a cap on fees for certain Industry Members that, based on message traffic alone, may be subject to “a significant allocation of Total CAT Costs.”⁴⁶

b. Minimum Participant Fee

The Operating Committee proposes to amend Section 11.3(a) of the CAT NMS Plan to impose a minimum fee to be payable by each Participant (“Minimum Participant Fee”) in addition to fees based on market share. The Operating Committee explains that this fee would

⁴² Options Market Makers and Equity Market Makers would be required to pay the Minimum Industry Member CAT Fee if their quarterly CAT fee calculated with the market maker discounts is less than \$125 per quarter. Id. at 21058, n.56.

⁴³ See Notice, supra note 4, at 21058–59.

⁴⁴ Id. at 21059.

⁴⁵ Id.

⁴⁶ Id.

“ensure that all Participants provide a meaningful contribution to the funding of the CAT”⁴⁷ and facilitate billing and other administrative functions.⁴⁸

c. Maximum Equities Participant Fee

The Operating Committee proposes to amend Section 11.3(a)(i) of the CAT NMS Plan to provide that any Participant that is a national securities association shall pay a maximum fee established by the Operating Committee (“Maximum Equities Participant Fee”) instead of the higher fee calculated based on such Participant’s market share. If a Participant’s fee is limited to such maximum fee, any excess amount which the Participant otherwise would have paid as a fee above such maximum amount will be re-allocated among all Equities Participants, including any Equities Participants that are subject to the maximum fee, in accordance with their market share.⁴⁹ The Operating Committee explains that FINRA could have a significant allocation of the CAT fees due to the large volume of NMS Stock activity subject to trade reporting on FINRA facilities, so the Maximum Equities Participant Fee would cap the costs allocated to FINRA. In addition, the Operating Committee states that, as one of the largest regulatory users of CAT, FINRA should pay a proportionate percentage of the CAT fees commensurate with its market share, and that market share is a “fair and reasonable basis for assessing regulatory usage, expense and burden among the Participants.”⁵⁰

7. Market Maker Discounts

The Operating Committee proposes to amend Section 11.3(b) of the CAT NMS Plan to add market maker message traffic discounts to the Proposed Funding Model. Under the Original Funding Model, there is no distinction between the treatment of message traffic for market maker Industry Members and message traffic for non-market maker Industry Members for

⁴⁷ Id. at 21060.

⁴⁸ Id. at 21059.

⁴⁹ See Notice, supra note 4, at 21061.

⁵⁰ Id. at 21062.

purposes of calculating Industry Member CAT fees. The Operating Committee explains that the proposed discounts are intended to address concerns raised previously that treating market maker message traffic the same as other message traffic for purposes of calculating Industry Member CAT fees would disproportionately impact market makers because of their continuous quoting obligations and result in an undue or inappropriate burden on competition or a reduction in liquidity and market quality.⁵¹ The Operating Committee believes that the proposed discounts would lower CAT fees for market makers and encourage their provision of liquidity to the market.⁵²

In the Participants' description of the Proposed Amendment, the Operating Committee states that Options Market Maker message traffic would be discounted based on the trade-to-quote ratio for options when calculating the message traffic of an Industry Member that is an Options Market Maker,⁵³ and that the trade-to-quote ratio for the Options Market Maker discount would be calculated each quarter based on the prior quarter's CAT Data.⁵⁴ The proposed discount would be calculated by dividing the adjusted trade count⁵⁵ by the total number of quotes received by the securities information processors ("SIP") from an exchange.⁵⁶ Each Options

⁵¹ Id. at 21057. See also Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) ("Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Establish Fees for Industry Members to Fund the Consolidated Audit Trail").

⁵² See Notice, supra note 4, at 21057.

⁵³ Id. at 21058. The CAT NMS Plan defines "Options Market Maker" as "a broker-dealer registered with an exchange for the purpose of making markets in options contracts traded on the exchange." See CAT NMS Plan, supra note 1, at Section 1.1.

⁵⁴ The CAT NMS Plan defines "CAT Data" as "data derived from Participant Data, Industry Member Data, SIP Data, and such other data as the Operating Committee may designate as 'CAT Data' from time to time." Id.

⁵⁵ The Proposed Amendment describes the adjusted trade count as "the total number of trades for the quarter minus the total number of trade busts." See Notice, supra note 4, at 21058.

⁵⁶ For each Options Market Maker, the discount would apply to "(1) all message traffic reported to the CAT by the Options Market Maker related to an order originated by a market maker in its market making account for a security in which it is registered... and (2) all message traffic for which a 'quote sent time' is reported by an Options Exchange

Market Maker's CAT fee would be calculated by multiplying its discounted percentage of total Industry Member message traffic during the relevant time period by the Industry Member Allocation,⁵⁷ subject to the Minimum Industry Member CAT Fee and the Maximum Industry Member CAT Fee.⁵⁸

Under the Proposed Funding Model, when calculating the message traffic of an Industry Member that is an equity market maker in NMS Stocks ("Equity Market Maker"), its discounted market making message traffic count would be calculated by multiplying its market making message traffic in NMS Stocks by the NMS Stock trade-to-quote ratio.⁵⁹ In the Participants' description of the Proposed Amendment, the Operating Committee states that the trade-to-quote ratio would be calculated each quarter based on the prior quarter's CAT Data.⁶⁰ The proposed discount would be calculated by dividing the adjusted trade count by the total number of quotes received by the SIP from an exchange. The Equity Market Maker's CAT fee would be calculated by multiplying its discounted percentage of total Industry Member message traffic during the relevant time period by the Industry Member Allocation,⁶¹ subject to the Minimum Industry Member CAT Fee and the Maximum Industry Member CAT Fee.⁶² The discounted message traffic of Options Market Makers and Equity Market Makers would be counted as part of total Industry Member message traffic.⁶³

on behalf of the given Options Market Maker." Id.

⁵⁷ See infra Section III.B.2.

⁵⁸ See Notice, supra note 4, at 21058.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ See infra Section III.B.2.

⁶² See Notice, supra note 4, at 21058.

⁶³ Id.

B. Participant Fee Schedule

1. Total CAT Costs

Under the Proposed Funding Model, the CAT fees for the relevant period would be designed to cover the total CAT costs associated with developing, implementing and operating the CAT for the relevant period (“Total CAT Costs”).⁶⁴ In the proposed Participant Fee Schedule, the Operating Committee proposes to define Total CAT Costs as “the total budgeted costs for the CAT for the relevant year.” In addition:

The total budgeted costs for the CAT for the relevant year shall be the total CAT costs set forth in the annual operating budget approved by the Operating Committee pursuant to Section 11.1(a) of the CAT NMS Plan. The total budgeted costs for the CAT for the relevant year may be adjusted on a quarterly basis as the Operating Committee reasonably deems appropriate for the prudent operation of the Company. To the extent that the Operating Committee adjusts the total budgeted costs for the CAT for the relevant year during its quarterly budget review, the adjusted budgeted costs for the CAT will be used in calculating the remaining CAT fees for that year.⁶⁵

The Operating Committee explains that using Total CAT Costs budgeted for the year, rather than already incurred CAT costs, would allow the Company to collect fees before bills become payable.⁶⁶ The Operating Committee notes that, pursuant to Section 11.1(c) of the CAT NMS Plan, any surpluses collected will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁶⁷

⁶⁴ Id. at 21050.

⁶⁵ Id. at 21074.

⁶⁶ Id. at 21063.

⁶⁷ Id.

2. 75%-25% Allocation between Industry Members and Participants

The Proposed Funding Model contemplates allocating CAT costs between Participants and Industry Members to permit the calculation of CAT fees based on market share for Participants and based on message traffic for Industry Members.⁶⁸ The Operating Committee proposes to implement this allocation through a 75%-25% allocation between Industry Members and Participants.⁶⁹ The Participant CAT fees that are a part of the proposed Participant Fee Schedule – Appendix B to the Proposed Amendment – would apply this allocation to Participants. Participants would file proposed rule changes to apply this allocation to Industry Members.⁷⁰ In calculating CAT fees for the relevant period under the Proposed Funding Model, Industry Members as a group would pay 75% of the Total CAT Costs for the relevant period (“Industry Member Allocation”)⁷¹ and Participants as a group would pay 25% of the Total CAT Costs for the relevant period (“Participant Allocation”).⁷²

In proposing a 75%-25% allocation between Industry Members and Participants, the Operating Committee states that it considered a variety of different potential allocations between Industry Members and Participants.⁷³ For example, the Operating Committee states that it

⁶⁸ In the Original Funding Model, costs were allocated between Execution Venues and certain Industry Members, whereas the Proposed Funding Model proposes to allocate costs between Participants and Industry Members.

⁶⁹ See Notice, supra note 4, at 21054.

⁷⁰ As of the date of this Order, only the Nasdaq and Cboe Participants have filed proposed rule changes. See supra note 19.

⁷¹ The proposed Participant Fee Schedule states “[t]he Industry Member Allocation for each quarter shall be 75% of 1/4th of the Total CAT Costs for the relevant year.” See Notice, supra note 4, at 21055. Under the Proposed Funding Model, each Industry Member would pay a CAT fee calculated by multiplying its message traffic percentage of total Industry Member message traffic per quarter by the Industry Member Allocation, subject to the market maker discounts for message traffic, as applicable, as well as the Minimum Industry Member CAT Fee and the Maximum Industry Member CAT Fee. Id.

⁷² Id. at 21054. The proposed Participant Fee Schedule states “[t]he Participant Allocation for each quarter shall be 25% of 1/4th of the Total CAT Costs for the relevant year.” Id. at 21055.

⁷³ Id. at 21054.

considered alternatives in which Participants paid larger contributions than 25% of the total CAT costs (e.g., a 50%-50% allocation between Industry Members and Participants) and alternatives in which Participants paid smaller contributions than 25% of the total CAT costs.⁷⁴ In the scenario where the Participants paid larger contributions than the 25% allocation, the Operating Committee believed that this was not fair or equitable to the Participants.⁷⁵ The Operating Committee came to this conclusion by assessing the number of Industry Members compared to Participants, noting that “there are only 25 Participants and approximately 1237 Industry Members, as of December 2020”, and analyzing the total revenue, noting that “Participants only represented approximately 4% of the total CAT Reporter revenue; Industry Members represented 96% of the total CAT Reporter revenue.”⁷⁶ Thus, the Operating Committee determined that allocating more than 25% of the total CAT costs to the Participants was not fair and equitable. Similarly, the Operating Committee did not believe that the revenue based allocation approach would be fair to the Industry Members because it would impose such a significant percentage (96%) of CAT costs on Industry Members.⁷⁷ Additionally, the Operating Committee determined that there would be practical difficulties in assessing the appropriate revenue figures for all CAT Reporters. Based upon its analysis, the Operating Committee decided that alternative approaches based upon revenue were not appropriate and could potentially have unfair impacts on both the Industry Members and the Participants.⁷⁸ Ultimately, the Operating Committee believes that the 75%-25% allocation will create a more equitable fee split because the Industry Members with the

⁷⁴ Id.

⁷⁵ See Notice, supra note 4, at 21055.

⁷⁶ Industry Member revenue was calculated based on the total revenue reported in the Industry Member’s FOCUS reports. Participant revenue was calculated based on revenue information provided in Form 1 amendments and/or publicly reported figures. Participants are not required to file uniform FOCUS-type reports regarding revenue like Industry Members. Accordingly, the revenue calculation for Participants is not as straightforward as for Industry Members. Id. at 21055, n.31.

⁷⁷ Id. at 21055.

⁷⁸ Id.

most message traffic and the Participant complexes with the most market share would pay comparable CAT fees.⁷⁹ The Operating Committee analyzed data from the fourth quarter of 2020, and determined that the three Industry Members with the most message traffic and the Participant complexes with the highest CAT fees would pay annual CAT fees in a similar range of five to six million dollars.⁸⁰

2. Participant CAT Fees

As described above, the Proposed Funding Model provides that the Operating Committee shall establish a minimum fee to be payable by each Participant in addition to a fee based on market share. In the proposed Participant Fee Schedule, the Operating Committee establishes 0.75% of the Participant Allocation as the Minimum Participant Fee⁸¹ regardless of market share.⁸² The total Minimum Participant Fees to be paid by each Participant would be subtracted from the Participant Allocation to determine the “Adjusted Participant Allocation.”⁸³

The proposed Participant Fee Schedule provides that the Equities Participant Allocation would be 60% of the Adjusted Participant Allocation and the Options Participant Allocation would be 40% of the Adjusted Participant Allocation.⁸⁴ The Operating Committee explained that this allocation was determined through negotiations among the Participants.⁸⁵

Each Participant would pay a quarterly Participant CAT fee to recover the costs of the CAT going forward. For Equities Participants, the quarterly Participant CAT Fee would be calculated by multiplying the Equities Participant Allocation by each Equities Participant’s percentage of total market share of NMS Stocks for all Equities Participants for the prior quarter,

⁷⁹ Id.

⁸⁰ Id.

⁸¹ See Notice, supra note 4, at 21060.

⁸² Id.

⁸³ Id.

⁸⁴ Id. at 21061. A Participant with both options and equities market share would be treated as both an Options Participant and an Equities Participant. Id.

⁸⁵ Id.

subject to the Maximum Equities Participant Fee (if applicable), and in addition to the Minimum Participant Fee.⁸⁶ For Options Participants, the quarterly Participant CAT fee would be calculated by multiplying the Options Participant Allocation by each Options Participant's percentage of total market share in Listed Options for the prior quarter, in addition to the Minimum Participant Fee.⁸⁷

The quarterly Participant CAT fee would be a quarterly CAT fee based on market share from the prior quarter and the allocation of Total CAT Costs under the Proposed Funding Model for the relevant year.⁸⁸ The Operating Committee proposes a fee schedule to implement the quarterly Participant CAT fee whereby each Participant would be assessed a CAT fee, on a quarterly basis, that is 25% of 1/4th of the total budgeted annual CAT costs for the relevant year, using CAT Data to calculate market share from the prior quarter of the relevant year.⁸⁹

Under the Proposed Funding Model, FINRA, as a national securities association, would be subject to the Maximum Equities Participant Fee as set by the Operating Committee. The Operating Committee proposes to establish in the Participant Fee Schedule a Maximum Equities Participant Fee equal to the greater of (x) 20% of the Equities Participant Allocation or (y) the highest CAT fee required to be paid by any other Equities Participant plus 5% of such highest CAT fee.⁹⁰ Accordingly, as discussed above, FINRA would pay its quarterly Participant CAT fee based on its market share in NMS Stocks, subject to the Maximum Equities Participant Fee.

3. Collection of Fees

The Participants' description of the Proposed Amendment states that the Operating Committee proposes to establish a system for the collection of CAT fees pursuant to Section 11.4 of the CAT NMS Plan. The Company will provide each Participant with an invoice setting forth

⁸⁶ See Notice, supra note 4, at 21061.

⁸⁷ Id. at 21062.

⁸⁸ Id. at 21062, 21063.

⁸⁹ Id. at 21063–21064.

⁹⁰ Id. at 21061.

the quarterly Participant CAT fee for each payment period. Each Participant will pay its CAT fees to the Company via the centralized system for the collection of CAT fees.⁹¹

⁹¹ Id. at 21068.

IV. Summary of Comments

⁹² See Letters to Vanessa Countryman, Secretary, Commission from Doug Patterson, Chief Compliance Officer, Cutler Group, LP, dated June 1, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8855258-238423.pdf) <https://www.sec.gov/comments/4-698/4698-8855258-238423.pdf> (“Cutler Letter”); Kelvin To, Founder and President, Data Boiler Technologies, LLC, dated May 3, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8749987-237362.pdf) <https://www.sec.gov/comments/4-698/4698-8749987-237362.pdf> (“Data Boiler Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, dated May 7, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8776522-237685.pdf) <https://www.sec.gov/comments/4-698/4698-8776522-237685.pdf> (“FIA PTG May 7th Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, dated May 12, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8793902-237843.pdf) <https://www.sec.gov/comments/4-698/4698-8793902-237843.pdf> (“FIA PTG May 12th Letter”); Matthew Price, Chief Operations Officer, Fidelity Capital Markets, dated May 12, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8791746-237802.pdf) <https://www.sec.gov/comments/4-698/4698-8791746-237802.pdf> (“Fidelity Letter”); Howard Meyerson, Managing Director, Financial Information Forum, dated April 29, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8736502-237163.pdf) <https://www.sec.gov/comments/4-698/4698-8736502-237163.pdf> (“FIF April 29th Letter”); Howard Meyerson, Managing Director, Financial Information Forum, dated May 21, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8843662-238307.pdf) <https://www.sec.gov/comments/4-698/4698-8843662-238307.pdf> (“FIF May 21st Letter”); Marcia E. Asquith, Executive Vice President, Board and External Relations, Financial Industry Regulatory Authority, Inc., dated May 12, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8793900-237824.pdf) <https://www.sec.gov/comments/4-698/4698-8793900-237824.pdf> (“FINRA Letter”); Andrew Stevens, General Counsel, IMC, dated May 20, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8819440-238105.pdf) <https://www.sec.gov/comments/4-698/4698-8819440-238105.pdf> (“IMC Letter”); Michael Lewin, Chief Executive Officer, Istra LLC, dated May 27, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8847370-238329.pdf) <https://www.sec.gov/comments/4-698/4698-8847370-238329.pdf> (“Istra Letter”); Gary Goldsholle, Chief Regulatory Officer and General Counsel, Long-Term Stock Exchange, Inc., dated May 19, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8815749-238025.pdf) <https://www.sec.gov/comments/4-698/4698-8815749-238025.pdf> (“LTSE Letter”); Kirsten Wegner, Chief Executive Officer, Modern Markets Initiative, dated May 6, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8771339-237583.pdf) <https://www.sec.gov/comments/4-698/4698-8771339-237583.pdf> (“MMI Letter”); Michael Blaugrund, Chief Operating Officer, NYSE Inc., dated May 10 2021, [available at](https://www.sec.gov/comments/4-698/4698-8779961-237701.pdf) <https://www.sec.gov/comments/4-698/4698-8779961-237701.pdf> (“NYSE Letter”); William Bartlett, Chief Executive Officer, Parallax Volatility Advisers, L.P., dated June 28, 2021, [available at](https://www.sec.gov/comments/4-698/4698-9006549-246006.pdf) <https://www.sec.gov/comments/4-698/4698-9006549-246006.pdf> (“Parallax Letter”); Ellen Greene, Managing Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association, dated May 12, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8790951-237769.pdf) <https://www.sec.gov/comments/4-698/4698-8790951-237769.pdf> (“SIFMA Letter”); James Toes, President and Chief Executive Officer, and Andrew D’Amore, Chairman of the Board, Security Traders Association, dated June 11, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8905922-244113.pdf) <https://www.sec.gov/comments/4-698/4698-8905922-244113.pdf> (“STA Letter”); Gunjan Chauhan, Senior Managing Director, Global Head of SPDR Capital Markets, State Street Global Advisors, dated May 12, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8793896-237842.pdf) <https://www.sec.gov/comments/4-698/4698-8793896-237842.pdf> (“SSGA Letter”); Kevin Donohue, General Counsel, Tower Research Capital LLC, dated May 12, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8793895-237841.pdf) <https://www.sec.gov/comments/4-698/4698-8793895-237841.pdf> (“Tower Letter”); and Thomas M. Merritt, Deputy General Counsel, dated May 12, 2021, [available at](https://www.sec.gov/comments/4-698/4698-8790127-237768.pdf) <https://www.sec.gov/comments/4-698/4698-8790127-237768.pdf> (“Virtu Letter”).

comment letters object to the Proposed Amendment⁹³ and one comment letter supports the Proposed Amendment.⁹⁴ In addition, the Commission received two comment letters requesting data from the Operating Committee,⁹⁵ one comment letter requesting data from the Company,⁹⁶ and one comment letter from the Operating Committee providing additional details on an illustrative example in Exhibit B to the Proposed Amendment,⁹⁷ and two response letters from the Operating Committee.⁹⁸

Scope of Costs to be Recovered from Industry Members

Several commenters question the scope of the CAT costs proposed to be recovered from Industry Members.⁹⁹ Two commenters state that Industry Members should only be responsible for the direct costs to build and operate the CAT, not the Participants' costs of doing business as SROs, such as insurance and consulting costs.¹⁰⁰ One commenter states that the Exchange Act

⁹³ See Data Boiler Letter; Fidelity Letter; FIA PTG May 12th Letter; FINRA Letter; IMC Letter; Istra Letter; LTSE Letter; MMI Letter; NYSE Letter; SIFMA Letter; SSGA Letter; STA Letter; Tower Letter; and Virtu Letter.

⁹⁴ See Cutler Letter (stating “[h]aving reviewed the Proposal, and having compared it to the previous CAT funding model, we see the Amendment as a vast improvement that is more fair and equitable to both Market Participants and Industry Members. We would urge that the Commission approve this amendment.”). *Id.* at 1.

⁹⁵ See FIF April 29th Letter; FIF May 21st Letter.

⁹⁶ See FIA PTG May 7th Letter.

⁹⁷ See Letter to Vanessa Countryman, Secretary, Commission from Michael Simon, CAT NMS Plan Operating Committee Chair, dated May 5, 2021, available at <https://www.sec.gov/comments/4-698/4698-8760381-237447.pdf> (“CAT Operating Committee May 5th Letter”).

⁹⁸ See Letters to Vanessa Countryman, Secretary, Commission from Michael Simon, CAT NMS Plan Operating Committee Chair, dated July 14, 2021, available at <https://www.sec.gov/comments/4-698/4698-9061305-246406.pdf> (“CAT Operating Committee July 14th Letter I”); from Michael Simon, CAT NMS Plan Operating Committee Chair, dated July 14, 2021, available at <https://www.sec.gov/comments/4-698/4698-9061306-246406.pdf> (“CAT Operating Committee July 14th Letter II”). CAT Operating Committee July 14th Letter II states, “these responses represent the consensus of the Participants, but that all Participants may not fully agree with each response set forth in this letter.” CAT Operating Committee July 14th Letter II at 1–2.

⁹⁹ See SIFMA Letter at 4; Virtu Letter at 5–6; FIA PTG May 12th Letter at 5; Data Boiler Letter at 8; Tower Letter at 3.

¹⁰⁰ See SIFMA Letter at 4; FIA PTG May 12th Letter at 5.

and Rule 613 do not even require the CAT NMS Plan to impose fees on Industry Members,¹⁰¹ and that the Participants have failed to justify an “additive CAT fee,”¹⁰² and notes the Participants were exclusively responsible for developing the CAT and for making decisions about the implementation costs for the CAT.¹⁰³ Another commenter asks for justification for why Industry Members should bear the costs of the CAT build when they had no involvement in the process.¹⁰⁴

In response to comments objecting to the imposition of CAT costs on Industry Members,¹⁰⁵ the Operating Committee states that Industry Members should be required to pay CAT costs in accordance with Rule 613 and the CAT NMS Plan.¹⁰⁶ The Operating Committee adds that, because all market participants would benefit from the enhanced regulatory oversight provided by the CAT, Industry Members and Participants should both contribute to covering its costs.¹⁰⁷

Six commenters object to the proposed imposition of historical costs on Industry Members.¹⁰⁸ Several commenters note that Industry Members had no input into or control over the decisions resulting in the historical costs, including the selection of Thesys Technologies,

¹⁰¹ See Virtu Letter at 2.

¹⁰² Id. at 3.

¹⁰³ Id. at 2.

¹⁰⁴ See MMI Letter at 3. Similarly, this commenter also requests the rationale for why “a small number of brokers should pay the vast majority of the now-inflated cost without having any insight or authority into the methodology and rationale for the cost?” Id. at 2. The Operating Committee responds that its proposed Maximum Industry Member CAT Fee would institute a cap on fees to fairly allocate costs to Industry Members to avoid certain Industry Members paying a significant allocation of Total CAT Costs. See CAT Operating Committee July 14th Letter II at 6–7.

¹⁰⁵ See Virtu Letter at 2–3; MMI Letter at 3.

¹⁰⁶ See CAT Operating Committee July 14th Letter II at 4–5.

¹⁰⁷ Id. at 5–6.

¹⁰⁸ See SIFMA Letter at 6; Virtu Letter at 5–6; Data Boiler Letter at 8; Istra Letter at 2–3; Tower Letter at 3; Fidelity Letter at 3, 5; MMI Letter at 3; Parallax Letter at 1.

LLC as the initial plan processor,¹⁰⁹ and the subsequent transition to FINRA as the plan processor.¹¹⁰ One commenter states, “the Participants must meet a high bar for the Commission to alter course and support any proposed rule changes that require non-Participants to pay the Thesys costs.”¹¹¹ One commenter questions the rationale for requiring Industry Members to pay 75% of the cost of the transition to FINRA, explaining that FINRA is completely funded by the industry.¹¹² Two commenters object to requiring Industry Members to pay the legal and consulting fees incurred by Participants prior to the approval of the CAT NMS Plan.¹¹³ Two commenters criticize the Proposed Amendment for requiring new Industry Members to pay CAT fees to recover historical costs, while exempting new Participants from such a requirement.¹¹⁴

In response to comments questioning the scope of the costs to be recovered from Industry Members,¹¹⁵ the Operating Committee states that the recovery from Industry Members of the historical costs, Thesys-related costs and third-party expenses (including legal, consulting and audit expenses) is consistent with the CAT NMS Plan and the Exchange Act.¹¹⁶ The Operating Committee states that, when approving the CAT NMS Plan, the Commission noted that the Exchange Act permits the Participants to charge their members fees to fund their self-regulatory obligations and that the Plan funding model was designed to impose fees reasonably related to the Participants’ self-regulatory obligations since the fees would be directly associated with the costs to build and maintain the CAT.¹¹⁷ Additionally, the Operating Committee states that the

¹⁰⁹ See SIFMA Letter at 6; Virtu Letter at 5–6; Fidelity Letter at 3, 5; Tower Letter at 3; MMI Letter at 3.

¹¹⁰ See Virtu Letter at 6.

¹¹¹ See Parallax Letter at 1.

¹¹² See Virtu Letter at 6.

¹¹³ See Tower Letter at 3; SIFMA Letter at 6.

¹¹⁴ See Virtu Letter at 6; SIFMA Letter at 6–7.

¹¹⁵ See Data Boiler Letter at 8; FIA PTG May 12th Letter at 2; Fidelity Letter at 3, 5; Istra Letter at 2–3; MMI Letter at 3; SIFMA Letter at 6; Tower Letter at 3; Virtu Letter at 5–6.

¹¹⁶ See CAT Operating Committee July 14th Letter I at 5.

¹¹⁷ Id. at 5.

Commission considered that the Participants could recover the costs of creating and funding the CAT central repository in the adopting release for Rule 613.¹¹⁸ The Operating Committee explains that these costs are critical to the creation, implementation and maintenance of the Plan and therefore should be within the scope of CAT fees.¹¹⁹

Lack of Industry Member Input

Several commenters express concern that the proposal was developed without the involvement of Industry Members.¹²⁰ One commenter states that it is “incredulous of the process used to construct a proposed allocation model in which Industry Members are allocated 75% of the expenses yet had no meaningful input into the model’s development.”¹²¹ Another commenter opines that Industry Members are being required to shoulder most of the costs of the CAT without having had any insight into the costs.¹²² Two commenters note the lack of representation of Industry Members on the Operating Committee.¹²³ One commenter believes that the technical expertise of the industry should be involved in the development of a new cost allocation proposal that contains “a full explanation of the proposed operating costs and... an appropriately detailed public disclosure of the operating budget.”¹²⁴ Another commenter suggests that the Commission ask the Participants to engage with the industry “to establish a workable allocation methodology

¹¹⁸ Id. at 5–6.

¹¹⁹ Id. at 6.

¹²⁰ See SIFMA Letter at 2; STA Letter at 2–3; Data Boiler Letter at 8; FIA PTG May 12th Letter at 2–3; IMC Letter at 2–3; Fidelity Letter at 2–3, 4; Tower Letter at 7; MMI Letter at 2, 3, 4.

¹²¹ See FIA PTG May 12th Letter at 3.

¹²² See MMI Letter at 2, 3.

¹²³ See Tower Letter at 7; Data Boiler Letter at 6. See also Parallax Letter at 2 (suggesting the admission of Industry Members and independent parties as members of the Operating Committee, along with full internal disclosure of costs, would benefit the operation of the CAT NMS Plan).

¹²⁴ See Tower Letter at 7.

that is simple, predictable and aligns responsibility for funding regulatory infrastructure with receiving economic benefits of the marketplace.”¹²⁵

In response to comments noting a lack of industry participation in the development of the Proposed Funding Model,¹²⁶ the Operating Committee explains that the CAT Advisory Committee and the public notice and comment processes afforded by Rule 608 of Regulation NMS¹²⁷ and Section 19 of the Exchange Act¹²⁸ have provided Industry Members and other market participants the opportunity to express their views on the funding model.¹²⁹ With respect to the comments expressing concern over a lack of Industry Member representation on the Operating Committee, the Operating Committee states that Industry Members can provide meaningful input on CAT matters through the current governance structure without compromising Commission and SRO oversight of Industry Members.¹³⁰

Participant Conflicts of Interest

Six commenters believe that the Participants have conflicts of interest that are reflected in the cost allocation proposed for the Participants and Industry Members.¹³¹ Two commenters believe that the Participants are attempting to further their commercial interests through the proposal at the expense of their Industry Member competitors.¹³² One commenter believes that the Participants are conflicted when determining how much of their own costs they should pay

¹²⁵ See NYSE Letter at 5. See also SIFMA Letter at 2 (agreeing with this statement).

¹²⁶ See FIA PTG May 12th Letter at 2–3; Fidelity Letter at 2–4; IMC Letter at 2; SIFMA Letter at 2; STA Letter at 2–3; Tower Letter at 7.

¹²⁷ 17 CFR 242.608.

¹²⁸ 15 U.S.C. 78s.

¹²⁹ See CAT Operating Committee July 14th Letter I at 7–8.

¹³⁰ Id. at 8.

¹³¹ See SIFMA Letter at 2; Virtu Letter at 2, 6; FIA PTG May 12th Letter at 2, 3, 4; Tower Letter at 1, 5, 7; Istra Letter at 2; MMI Letter at 4. See also Parallax Letter at 3–4 (stating that the proposed market maker discounts benefit the Participants who have set the standards for market-making activity, including activity resulting in message traffic with low order to trade ratios).

¹³² See SIFMA Letter at 2; Virtu Letter at 2.

and suggests greater transparency to expose any Participant conflicts.¹³³ Another commenter states, “[t]o permit for-profit exchanges to allocate 75% of the costs of the CAT to Industry Members furthers the Participants’ commercial interests at the expense of the Industry Members, who have no choice but to pay such fees or else be subject to regulatory actions by the Participants.”¹³⁴ This commenter suggests that the Commission require the Participants to resubmit a proposal with a transparent analysis and requests that Industry Members be permitted adequate representation on the Operating Committee.¹³⁵

In response to the comments regarding potential conflicts of interests behind the proposed cost allocation for Participants and Industry Members,¹³⁶ the Operating Committee states that it disagrees with the comments and notes that the CAT NMS Plan contains measures to protect against potential conflicts of interest related to CAT fees, “including the fee filing requirements under the Exchange Act and operating the CAT on a break-even basis.”¹³⁷

Lack of Transparency

Several commenters express concern that the Proposed Funding Model lacks sufficient transparency into the operating budget as well as the costs proposed to be recovered by the CAT fees.¹³⁸ One commenter believes the lack of cost data would make it impossible for the Commission and Industry Members to determine whether the CAT is operating efficiently.¹³⁹ The commenter adds that detailed cost information would be useful for Industry Members to

¹³³ See FIA PTG May 12th Letter at 3.

¹³⁴ See Tower Letter at 5.

¹³⁵ See Tower Letter at 5.

¹³⁶ See Data Boiler Letter at 6, 7; FIA PTG May 12th letter at 2, 3; MMI Letter at 4; Parallax Letter at 3–4; Tower Letter at 1, 5, 7.

¹³⁷ See CAT Operating Committee July 14th Letter I at 8.

¹³⁸ See SIFMA Letter at 4–5; Virtu Letter at 4–5; SSGA Letter at 1–2; Fidelity Letter at 2, 4–5; NYSE Letter at 2; STA Letter at 1, 3–4; Tower Letter at 2, 5, 7; MMI Letter at 2, 3–4; FIA PTG May 12th Letter at 2, 5; IMC Letter at 1, 2; Istra Letter at 1, 2; Parallax Letter at 1–2, 5.

¹³⁹ See SIFMA Letter at 5.

evaluate whether certain of their activities are causing the CAT to incur higher operating costs, and consequently causing increases in their own CAT fees.¹⁴⁰ This commenter added that it is impossible to evaluate whether the Proposed Funding Model is consistent with the Exchange Act due to lack of information; in particular, details concerning sources of the costs and the operating budget.¹⁴¹ Similarly, another commenter suggests the provision of non-proprietary cost information to allow meaningful input from Industry Members.¹⁴² Another commenter believes that it “feels like we are being asked to hand over [a] blank check with the amount to be filled in later.”¹⁴³ One commenter states, “the Amendment is virtually silent on the use of funds and offers no budget for the CAT’s ongoing operation.”¹⁴⁴

Commenters request detailed information on the historical costs and the operating budget.¹⁴⁵ One commenter recommends that the Proposed Amendment disclose its costs and technical requirements, and detail the historical costs and projected annual budget for the Plan operating expenses, professional services expenses, and plan processor expenses.¹⁴⁶ The commenter recommends that the Participants make the annual budget public in the future.¹⁴⁷ Another commenter states that the Proposed Amendment lacks an explanation for the 2021 estimated cost of \$133 million, including the scale of CAT processing, number of reported transactions, data storage sizes and processing performed.¹⁴⁸ The commenter states that an operating budget is necessary to determine how much of CAT costs is variable based on message

¹⁴⁰ Id. at 5.

¹⁴¹ Id. at 4.

¹⁴² See STA Letter at 3.

¹⁴³ See Virtu Letter at 4.

¹⁴⁴ See NYSE Letter at 2.

¹⁴⁵ Id. at 2; Tower Letter at 2, 7; Istra Letter at 2; Fidelity Letter at 5; MMI Letter at 2–3, 4; FIA PTG May 12th Letter at 5; Parallax Letter at 1–2, 5.

¹⁴⁶ See NYSE Letter at 2.

¹⁴⁷ Id. at 2.

¹⁴⁸ See Tower Letter at 2.

traffic.¹⁴⁹ The commenter recommends that the Operating Committee propose a new cost allocation plan that includes a full accounting of the historical costs and justification for charging these costs to Industry Members.¹⁵⁰ The commenter also recommends that the new proposal explain its proposed operating costs and publicly disclose its operating budget.¹⁵¹

Another commenter notes that the Proposed Amendment lacks detail on the historical CAT assessment costs and requests the Participants to provide the opportunity to review the costs incurred before the CAT NMS Plan was approved, noting that Industry Members should be permitted “to refute the validity of any cost and its allocation to Industry Members.”¹⁵² Another commenter states that the Proposed Amendment provides no transparency into historical and annual costs.¹⁵³ One commenter requests the Commission to require the Participants to provide a cost-sharing structure with greater transparency, including a full accounting of historical costs and a detailed public explanation of the proposed operating costs.¹⁵⁴ The commenter urges greater transparency in the operating budget, the cost allocation model, and on variable costs, such as messaging costs, and fixed costs, such as payroll costs.¹⁵⁵

Commenters also request a breakdown of the estimated CAT costs and operating budget.¹⁵⁶ Two commenters request a copy of the 2021 operating budget with quarterly updates including actual and revised projections.¹⁵⁷ One of the commenters also requests data to permit each Industry Member to calculate its fees, including the data used by the Operating Committee

¹⁴⁹ Id. at 2.

¹⁵⁰ Id. at 7.

¹⁵¹ Id. at 7.

¹⁵² See Fidelity Letter at 5.

¹⁵³ See FIA PTG May 12th Letter at 5.

¹⁵⁴ See MMI Letter at 2–3.

¹⁵⁵ Id. at 4.

¹⁵⁶ See SSGA Letter at 2; Fidelity Letter at 5; FIF April 29th Letter at 1, 2; FIA PTG May 7th Letter at 2.

¹⁵⁷ See FIF April 29th Letter at 1; FIA PTG May 7th Letter at 2; FIA PTG May 12th Letter at 2.

to calculate the estimates in Exhibit B to the Proposed Amendment.¹⁵⁸ In a response, the Operating Committee provides the following data: (1) the budgeted Total CAT Costs for 2021; (2) total Industry Member message traffic counts, including the total message counts for Options Market Makers and Equity Market Makers, used in the proposal's Exhibit B; (3) unrounded trade-to-quote ratios for Listed Options and NMS Stocks; and (4) the method used to calculate an Industry Member's quarterly CAT fees.¹⁵⁹ The Operating Committee states that Industry Members can contact FINRA CAT to learn which of the anonymized Industry Member information in Exhibit B represents its traffic, as well as its total message traffic count and percentage or number of its reported events that were treated as events of Options Market Makers or Equity Market Makers.¹⁶⁰ The Operating Committee also agrees to provide information to permit an Industry Member to calculate its actual CAT fees on an ongoing basis.¹⁶¹ Subsequently, the first commenter requests further information to understand the impact of the funding proposal and help each Industry Member reconcile the data it received from the Operating Committee and its internal records.¹⁶² The second commenter finds the response from the Operating Committee insufficient and requests a copy of the 2021 operating budget and any quarterly updates and projected costs, a breakdown of fixed and variable expenses, and provision to Industry Members of data used to support the selected funding model and the funding models that were rejected.¹⁶³

¹⁵⁸ See FIF April 29th Letter at 2. This commenter also requests that the Operating Committee publicly provide the options and equity trade-to-quote ratios used in the Proposed Amendment's Exhibit B and the aggregate number of reportable events of each type that are counted toward the total number of reportable events. Id.

¹⁵⁹ See CAT Operating Committee May 5th Letter. This response was also noted by the Operating Committee in a response to comments. See CAT Operating Committee July 14th Letter II at 16.

¹⁶⁰ See CAT Operating Committee May 5th Letter at 2.

¹⁶¹ Id. at 2, n.8.

¹⁶² See FIF May 21st Letter at 2–3.

¹⁶³ See FIA PTG May 12th Letter at 2.

Several commenters believe the lack of transparency prevents Industry Members from estimating their costs and fees.¹⁶⁴ One commenter believes that the Proposed Amendment lacks information needed by Industry Members to calculate their fees as well as to analyze the fairness and accuracy of the funding model.¹⁶⁵ The commenter notes that 75 of 1,237 Industry Members would be allocated 99% of Industry Member fees, and that the Proposed Amendment claims that this is fair without factual support.¹⁶⁶ One commenter acknowledges the data subsequently provided in the response from the Operating Committee¹⁶⁷ and suggests that the Participants regularly provide updated message traffic data to Industry Members to allow them to estimate their CAT fees.¹⁶⁸ Another commenter opines that the supplementary message traffic data and the 2021 budget information provided by the Operating Committee is insufficient to allow Industry Members to project their CAT fees.¹⁶⁹ One commenter suggests that cost recovery should have “transparent inputs” that would permit Industry Members to predict their costs and understand the costs of their actions.¹⁷⁰

In response to comments requesting additional transparency into CAT costs,¹⁷¹ the Operating Committee states that it has made publicly available substantial annual cost data by providing, upon request, its audited financial statements from the inception of Consolidated Audit Trail LLC and CAT NMS, LLC through 2020, as required by Section 9.2(a) of the CAT NMS Plan.¹⁷² The Operating Committee explains that the audited financial statements contain

¹⁶⁴ See Tower Letter at 3; SIFMA Letter at 5, 9; Virtu Letter at 4.

¹⁶⁵ See Tower Letter at 3.

¹⁶⁶ Id.

¹⁶⁷ See CAT Operating Committee May 5th Letter.

¹⁶⁸ See SIFMA Letter at 5.

¹⁶⁹ See Virtu Letter at 4.

¹⁷⁰ See Istra Letter at 2–3.

¹⁷¹ See FIA PTG May 12th Letter at 2, 5; Fidelity Letter at 3, 5; Istra Letter at 2; MMI Letter at 3, 4; NYSE Letter at 2; Parallax Letter at 1–2; SIFMA Letter at 4; STA Letter at 3; SSGA Letter at 1–2; Tower Letter at 2, 4, 7; Virtu Letter at 4.

¹⁷² See CAT Operating Committee July 14th Letter I at 4.

the following cost categories: “technology costs, legal, amortization of developed technology, consulting, insurance, professional and administration, and public relations.”¹⁷³ The Operating Committee also states that the Proposed Funding Model would provide additional cost transparency through the provision of the operating budget at the start of each year, as well as the budgeted Total CAT Costs to be used in calculating the quarterly CAT fees, and any quarterly budget adjustments.¹⁷⁴ The Operating Committee adds that it proposes to provide additional cost information to the industry through webinars, among other methods,¹⁷⁵ and notes the cost-related information it provided in its May 5th letter.¹⁷⁶

Several commenters believe the Proposed Amendment does not properly explain increases in historical and annual costs in excess of prior estimates.¹⁷⁷ One commenter states, “[t]here may well be appropriate – or at least understandable – reasoning for historical and ongoing costs to greatly exceed expectations, and that is for the Participants to explain and the Commission to review as part of its oversight of the SROs.”¹⁷⁸ Two commenters ask if any corresponding benefits accompany the increased cost estimates.¹⁷⁹ One commenter expresses concern that the Participants have no accountability for the costs of the project.¹⁸⁰ Another commenter requests assurances that the CAT will not become an “ever-growing expense” for the industry and investors.¹⁸¹ Another commenter, a proprietary trading firm, states that it “captures real time market data feeds from over 100 venues around the world, in a variety of different

¹⁷³ Id.

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Id. at 3–4. See also CAT Operating Committee May 5th Letter.

¹⁷⁷ See FIA PTG May 12th Letter at 4–5; SSGA Letter at 1–2; Istra Letter at 2; MMI Letter at 1–2, 3–4; Tower Letter at 1, 2–4; Parallax Letter at 2.

¹⁷⁸ See Parallax Letter at 2.

¹⁷⁹ See MMI Letter at 2; SSGA Letter at 2.

¹⁸⁰ See FIA PTG May 12th Letter at 5.

¹⁸¹ See SSGA Letter at 2.

products... The processing of this historical market data might reasonably be compared to the kind of processing that the CAT is expected to do... While we do not claim that this is a perfect comparison, we do posit that the cost to build and maintain the CAT should be reasonably comparable.”¹⁸² The commenter states that its annual cost for this platform is ten times less than the cost provided in the Proposed Amendment.¹⁸³

In response to comments questioning the increases in CAT costs from prior estimates,¹⁸⁴ the Operating Committee explains that data processing and storage costs are the primary CAT cost drivers and that these costs have increased significantly each year.¹⁸⁵ First, the Operating Committee states that these costs are directly related to data volumes reported to the CAT and that the markets have experienced record high volumes, noting that in 2019 and 2021, data volumes were five times greater than estimated.¹⁸⁶ To address the increased volume, the CAT’s storage and computing needs have accordingly increased.¹⁸⁷ Second, the Operating Committee explains that the phased introduction of CAT reporting and functionality results in “a substantial increase in message traffic, processing complexity and storage requirements.”¹⁸⁸ Third, the Operating Committee states that the processing and storage of the many complex reporting scenarios relating to Industry Member market activity require complicated algorithms that result in “significant data processing and storage costs.”¹⁸⁹ Finally, the Operating Committee notes that the combination of record CAT Data volumes with the stringent performance timelines and

¹⁸² See Tower Letter at 4.

¹⁸³ Id.

¹⁸⁴ See FIA PTG May 12th Letter at 4–5; Istra Letter at 2; MMI Letter at 1–2, 4; Parallax Letter at 1–2; SSGA Letter at 1–2; Tower Letter at 1–4.

¹⁸⁵ See CAT Operating Committee July 14th Letter I at 2.

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ Id. at 3.

¹⁸⁹ Id.

operational requirements applicable to the processing of CAT Data do not allow much flexibility for cost reductions.¹⁹⁰

Some commenters believe that the Proposed Funding Model lacks the transparency needed to incentivize the Participants to manage CAT costs efficiently.¹⁹¹ One commenter states the lack of transparency precludes the Operating Committee's accountability and suggests a full audit of the CAT's historical costs, ongoing budget and a comparison to its estimated benefits.¹⁹² Another commenter believes that allowing Industry Members greater visibility into CAT's expenses would increase the Participants' accountability to manage costs.¹⁹³

In response to comments urging more transparency to ensure the Participants manage CAT Costs efficiently,¹⁹⁴ the Operating Committee states that it "has a strong focus on cost management and is significantly incented to keep costs at an appropriate level."¹⁹⁵ The Operating Committee notes that it actively pursues cost saving measures and has a Cost Management Working Group to address cost management needs.¹⁹⁶ Additionally, the Operating Committee states that the plan processor regularly reviews options to lower compute and storage needs and works with CAT technology providers to provide services in a cost-effective manner.¹⁹⁷

Finally, one commenter states that the Proposed Amendment needs to explain what would happen if actual CAT operating costs exceed the budget and what would happen if the CAT becomes over-budget. The commenter believes that a revised amendment should provide

¹⁹⁰

Id.

¹⁹¹ See SIFMA Letter at 5; Fidelity Letter at 3, 5; Tower Letter at 2; FIA PTG May 12th Letter at 5.

¹⁹² See Istra Letter at 1.

¹⁹³ See Fidelity Letter at 5.

¹⁹⁴ See FIA PTG May 12th Letter at 5; Fidelity Letter at 3; Tower Letter at 2, 7.

¹⁹⁵ See CAT Operating Committee July 14th Letter I at 4–5.

¹⁹⁶ Id. at 5.

¹⁹⁷ Id.

further details on the CAT budget and potential budget surpluses.¹⁹⁸ In response to the comment,¹⁹⁹ the Operating Committee explains that it would address budget shortfalls or excess fees through updates to the budgets and operational reserves.²⁰⁰ The Operating Committee states that to recover the costs of CAT on an ongoing basis, it will use the costs in the annual operating budget as the Total CAT Costs to be used to calculate CAT fees, and that these budgeted costs may be adjusted on a quarterly basis to address any changes to the budget.²⁰¹ The Operating Committee states that if CAT fees exceed the CAT costs, despite quarterly budget adjustments, any surplus would be treated as an operational reserve to offset fees in future payments, in accordance with Section 11.1(c) of the CAT NMS Plan.²⁰² If CAT fees are less than CAT costs, the Operating Committee states that it “may address the shortfall by using the operational reserve, including the amount of the shortfall in future fees and/or seeking to recover the costs via other measures in accordance with the Exchange Act.”²⁰³

Allocation of Costs between Industry Members and Participants

Many commenters raise concerns about the proposed allocation of costs between Industry Members and Participants.²⁰⁴ Several commenters argue that the allocation lacks justification for the decision to recover 75% of Total CAT Costs from Industry Members and 25% from Participants.²⁰⁵ Two commenters believe the allocation to Industry Members is “arbitrary and

¹⁹⁸ See Fidelity Letter at 3, 5.

¹⁹⁹ Id. at 5.

²⁰⁰ See CAT Operating Committee July 14th Letter I at 6.

²⁰¹ Id. at 6–7.

²⁰² Id. at 7.

²⁰³ Id.

²⁰⁴ See Fidelity Letter at 2–4; NYSE Letter at 1–2; Tower Letter at 4–5; MMI Letter at 4–5; Istra Letter at 3; SIFMA Letter at 5–8; Virtu Letter at 3–6; Data Boiler Letter at 7; FIA PTG May 12th Letter at 3, 4; FINRA Letter at 3, 4–5; Parallax Letter at 2–3.

²⁰⁵ See Fidelity Letter at 3–4; NYSE Letter at 1–2; Tower Letter at 4–5; MMI Letter at 4–5; Istra Letter at 3; Virtu Letter at 3–4; SIFMA Letter at 5–6.

unsupportable” under the Exchange Act.²⁰⁶ One commenter challenges the Participants’ justification for the allocation – that there are more Industry Members than Participants and Industry Members receive much more revenue than Participants – as not providing a rational basis on which to claim that the Proposed Amendment provides for a fair allocation of reasonable fees and does not impose an undue burden on competition.²⁰⁷ Another commenter states, “[i]t is unclear from the proposal why the ability to pay is a corollary to CAT costs and an appropriate factor in justifying the split.”²⁰⁸ One commenter states that costs are not deemed reasonable because a party can afford the costs, because the costs are not large enough to be material, or because the costs can be shared among thousands of Industry Members.²⁰⁹ Another commenter believes that the cost allocation should have focused on what market participants should pay based on costs and benefits, rather than ability to pay based on aggregate revenues.²¹⁰

One commenter believes the cost allocation is inequitable and an undue burden on Industry Members.²¹¹ The commenter believes that CAT fees should only be imposed on beneficiaries of CAT services,²¹² allocated in proportion to benefit received.²¹³ The commenter believes that market participants that pose higher risks and potential conflicts of interest should pay higher fees than other market participants.²¹⁴

One commenter approves the proposed elimination of tiering, but expresses concern at the allocation, stating that allocating set percentages of total costs to one group over another is

²⁰⁶ See SIFMA Letter at 5–6; Virtu Letter at 3.

²⁰⁷ See SIFMA Letter at 5–6.

²⁰⁸ See Fidelity Letter at 4.

²⁰⁹ See Parallax Letter at 2.

²¹⁰ See Virtu Letter at 3–4.

²¹¹ See Data Boiler Letter at 6, 7.

²¹² Id. at 6.

²¹³ Id. at 7.

²¹⁴ Id. at 8.

the wrong approach.²¹⁵ The commenter criticizes the Proposed Amendment for basing the allocation on ensuring that the highest paying Industry Members pay the same as the highest paying Participants.²¹⁶ Additionally, this commenter believes that Participants would have no incentive to manage costs if they are only responsible for 25% of Total CAT Costs.²¹⁷ For the same reason, another commenter believes there is little incentive for Participants to justify their historical costs or manage a reasonable and efficient operating budget.²¹⁸ The commenter believes the cost allocation methodology differences between the Industry Members and the Participants warrants further discussion and transparency.²¹⁹

One commenter notes that the Proposed Funding Model does not explain how the 75% allocation to Industry Members relates to overall CAT costs resulting from Industry Member reporting and therefore may not be supported by Section 11.2(a) and Section 11.2(b) of the CAT NMS Plan.²²⁰ Another commenter suggests a 50%-50% cost allocation between Industry Members and Participants and argues that any allocation should be transparent and predictable and supported by evidence.²²¹ The commenter suggests that Industry Member costs be allocated

²¹⁵ See FIA PTG May 12th Letter at 4. The Operating Committee acknowledges the commenter's support of the elimination of tiering. See CAT Operating Committee July 14th Letter II at 8, 13.

²¹⁶ See FIA PTG May 12th Letter at 4.

²¹⁷ Id.

²¹⁸ See MMI Letter at 4–5.

²¹⁹ Id. at 5.

²²⁰ See FINRA Letter at 5. Section 11.2(a) of the CAT NMS Plan requires the Operating Committee, in establishing the funding of the Company, to create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company. Section 11.2(b) requires the Operating Committee to establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon Company resources and operations.

²²¹ See Istra Letter at 5–6.

based on the value any Industry Member receives from the market.²²² One commenter believes the proposal lacks information for commenters to understand how CAT costs are allocated across asset classes.²²³ The commenter suggests the creation of a predictable cost allocation methodology reached through engagement with Industry Members that aligns costs with the receipt of benefits from the market.²²⁴

One commenter believes the proposed allocation is arbitrary because the Participants override the allocation with adjusted allocations, such as the proposed market maker discounts, the Minimum Industry Member CAT Fee and the Maximum Industry Member CAT Fee, and the treatment of OTC Equity Security share volume.²²⁵ The commenter believes the Proposed Funding Model would shift the regulatory cost of overseeing one Industry Member to another Industry Member, with the potential effect of retail investors who transact with small Industry Members indirectly subsidizing sophisticated investors who transact with large market-makers.²²⁶ The commenter states, “the Operating Committee has not provided a sufficient regulatory case for a proposed funding model which imposes different costs for the same CAT reportable events.”²²⁷

Several commenters believe the proposed cost allocation between Industry Members and Participants ignores the time investment and costs already incurred by Industry Members to report to the CAT.²²⁸ One commenter notes that Industry Members have had to develop internal systems for CAT reporting and that Industry Members have provided critical assistance to the

²²² Id.

²²³ See NYSE Letter at 4.

²²⁴ Id. at 5.

²²⁵ See Parallax Letter at 3.

²²⁶ Id.

²²⁷ Id.

²²⁸ See SIFMA Letter at 7–8; FIA PTG May 12th Letter at 5; Tower Letter at 4–5. See also Fidelity Letter at 2 (stating that Industry Members have spent much time and money on building systems to comply with CAT requirements but will not be reimbursed for these costs).

Participants in developing Industry Member CAT Technical Specifications.²²⁹ The commenter opines that an analysis of the costs incurred by Industry Members for internal compliance would demonstrate that the Industry Allocation is not an equitable allocation of reasonable fees.²³⁰ Another commenter notes that the Proposed Amendment does not mention the substantial time and cost invested by Industry Members into refining reporting specifications and building CAT reporting platforms,²³¹ and one other commenter believes that the Proposed Amendment ignores the substantial costs that Industry Members have incurred associated with the development, testing and implementation of the CAT.²³²

One commenter states that the Proposed Funding Model treats affiliated Participants differently than affiliated Industry Members without explaining how this inconsistency is consistent with the Exchange Act.²³³ The commenter explains that affiliated Participants would be charged based on aggregate market share as a single complex, while affiliated Industry Members would be charged individually based on individual message traffic. The commenter states, “[t]his methodology seems to be rooted in the Participants’ view that it provides for a fair allocation of fees under the proposal because it results in the largest Participant complexes being charged approximately the same level of fees as the largest Industry Members.” The commenter notes that the result is not a fair allocation of reasonable fees as the largest Industry Members have multiple affiliates that, if viewed as a single aggregated complex like affiliated Participants, would pay greater CAT fees than the largest Participant complexes.²³⁴

²²⁹ See SIFMA Letter at 7–8. See also STA Letter at 3 (describing collaborative efforts by Industry Members and Participants to develop technical specifications).

²³⁰ See SIFMA Letter at 7–8.

²³¹ See Tower Letter at 4–5.

²³² See FIA PTG May 12th Letter at 5.

²³³ See SIFMA Letter at 8.

²³⁴ Id.

One commenter questions why equities and options message traffic is combined for Industry Member cost allocation purposes, unlike the Participant Allocation where 60% of the Total CAT Costs would be allocated to Equities Participants and 40% would be allocated to Options Participants.²³⁵ The commenter states, “[i]f message traffic is indeed the major driver of CAT costs, then it stands to reason that at least 40% of the Industry Member costs be allocated to options (as in the Participants’ allocation framework), if not significantly more.”²³⁶

Four commenters note that, under the proposed allocation, Industry Members must not only cover their allocation of the Total CAT Costs, but they must also fund FINRA, which would owe its own share of Participant CAT fees.²³⁷ One commenter believes that, including FINRA’s allocation, the Industry Member Allocation would exceed 80%.²³⁸ The commenter notes that the Proposed Amendment does not explain why FINRA should be treated the same way as exchanges for allocation purposes when Industry Members pay FINRA’s operation costs through regulatory fees and fines.²³⁹ Another commenter believes that FINRA will raise its fees to help pay for its own Participant Allocation, further increasing the cost to be borne by Industry Members.²⁴⁰ This commenter suggests that the Participants should submit a new proposal with a cost methodology supported by data that Industry Members can evaluate.²⁴¹ FINRA itself comments, “[o]ne effect of adopting these unsupported allocation criteria would be an unjustified increase in FINRA’s fee assessments...”²⁴² FINRA also states that because it relies on

²³⁵ See Istra Letter at 3–4.

²³⁶ Id. at 4.

²³⁷ See Virtu Letter at 4, 6; Fidelity Letter at 4; SIFMA Letter at 7; Tower Letter at 5.

²³⁸ See SIFMA Letter at 7.

²³⁹ Id.

²⁴⁰ See Fidelity Letter at 4.

²⁴¹ Id.

²⁴² See FINRA Letter at 9.

regulatory fees from members, the Proposed Funding Model would reallocate FINRA’s costs to Industry Members in addition to the CAT fees to be borne by Industry Members.²⁴³

In response to comments questioning the justification for the proposed 75%-25% allocation,²⁴⁴ the Operating Committee states that this allocation “continues to be an equitable allocation of reasonable CAT fees between Industry Members and Participants that balances the costs paid by each CAT Reporter and the regulatory benefits each receives.”²⁴⁵ The Operating Committee reiterates the arguments it made in support of the allocation from the Proposed Amendment.²⁴⁶

Several commenters state that the Proposed Amendment does not consider whether regulatory fees and fines paid by Industry Members could offset the costs of CAT.²⁴⁷ One commenter asserts that the Proposed Funding Model did not consider using exchange regulatory revenues or profits as sources of funding and did not explain why fines paid by Industry Members for CAT reporting violations could not offset the costs of operating the CAT.²⁴⁸ In addition, the commenter states that the Proposed Funding Model did not analyze whether FINRA’s Trading Activity Fee (“TAF”) could offset the costs of CAT when OATS is retired, or whether FINRA could reduce the TAF rate.²⁴⁹ The commenter said that inclusion of this

²⁴³ Id.

²⁴⁴ See Data Boiler Letter at 7; FIA PTG May 12th Letter at 4; Fidelity Letter at 2–4; FINRA Letter at 5; Istra Letter at 3; MMI Letter at 4; NYSE Letter at 2; Parallax Letter at 2; SIFMA Letter at 5–8; STA Letter at 4; Tower Letter at 4; Virtu Letter at 3–4.

²⁴⁵ See CAT Operating Committee July 14th Letter II at 2.

²⁴⁶ Id. at 2–4; Notice, supra note 4 at 21054–21055.

²⁴⁷ See Tower Letter at 5; SIFMA Letter at 7; Virtu Letter at 3; FIA PTG May 12th Letter at 5; Parallax Letter at 4. See also Data Boiler Letter at 7 (suggesting that fines and settlements should fund the CAT).

²⁴⁸ See SIFMA Letter at 7. See also MMI Letter at 5–6 (stating that information is needed concerning any potential cost-savings to FINRA from OATS retirement that could offset the cost of running the CAT, as well as a proposed TAF increase in 2022); Virtu Letter at 4 (stating that the Proposed Amendment should have analyzed whether FINRA’s TAF could offset CAT costs after OATS has been retired).

²⁴⁹ See SIFMA Letter at 7.

analysis would reveal that the Industry Allocation is not an equitable allocation of reasonable fees.²⁵⁰ Another commenter argues that Industry Members pay membership fees, registration and licensing fees, and regulatory fees to Participants, yet the Proposed Funding Model did not address how these fees are allocated and why Industry Members must be responsible for a new funding requirement.²⁵¹ One commenter believes that revenues from fines should be allocated to the Company's operating reserve in order to decrease CAT costs.²⁵²

In response to comments suggesting that regulatory fines and cost savings due to the retirement of OATS should be used to decrease CAT costs,²⁵³ the Operating Committee states that it will not reduce CAT fees based on the ancillary effects of the CAT.²⁵⁴ The Operating Committee explains that the proposed CAT fees account for the costs to create, implement and maintain the CAT, not other aspects of the Participants' regulatory operations.²⁵⁵

Finally, one commenter argues that the elimination of comparability as a funding principle removes support for the proposed cost allocation.²⁵⁶ The commenter explains that comparability was key to the decision to propose the 75%-25% allocation to Industry Members and Participants when the Participants previously proposed CAT fees in 2017.²⁵⁷ The

²⁵⁰ Id.

²⁵¹ See Virtu Letter at 3.

²⁵² See FIA PTG May 12th Letter at 5

²⁵³ Id.; MMI Letter at 5–6; SIFMA Letter at 7; Tower Letter at 5; Virtu Letter at 4.

²⁵⁴ See CAT Operating Committee July 14th Letter I at 6.

²⁵⁵ Id.

²⁵⁶ See FINRA Letter at 2–4.

²⁵⁷ On May 9, 2017, the Operating Committee for the Company filed proposed Amendment No. 2 to the CAT NMS Plan to establish the CAT fees to be paid by the Participants. See Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Brent J. Fields, Secretary, Commission, dated May 9, 2017. See also Securities Exchange Act Release No. 80930 (June 14, 2017), 82 FR 28180 (June 20, 2017). The Commission issued an order of summary abrogation of Amendment No. 2 on July 21, 2017. See Securities Exchange Act Release No. 81189 (July 21, 2017), 82 FR 35005 (July 27, 2017). The Participants subsequently filed proposed Amendment No. 3 to the CAT NMS Plan on October 30, 2017 to establish the Participant CAT fees. See Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Brent J. Fields, Secretary,

commenter explains that the Participants removed comparability from the funding model because the Proposed Funding Model no longer assesses fees through tiers.²⁵⁸ The commenter states, “if the principle driving the change to a no-tier approach is to assess fees more transparently on CAT Reporters in direct relation to the costs that each creates for the CAT with its reporting activity, the Proposed Funding Model fails to apply this principle consistently.”²⁵⁹ The commenter adds that the Proposed Amendment does not discuss the impact of the removal of the tiers and the comparability principle on the funding model.²⁶⁰

In response to the comment,²⁶¹ the Operating Committee explains that the comparability provision was used to determine fee tiers. Since a tiered fee structure would not be used under the Proposed Funding Model, the Operating Committee believes it is appropriate to delete the comparability provision as it is no longer relevant.²⁶²

Allocation of Costs between Equities and Options Participants

Two commenters argue that the Proposed Amendment failed to justify the proposed 60%-40% allocation of costs between Equities and Options Participants.²⁶³ Both commenters believe

Commission, dated October 30, 2017. On December 11, 2017, the Operating Committee filed proposed Amendment No. 4 to the CAT NMS Plan, which replaced and superseded Amendment No. 3 in its entirety. See Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Brent J. Fields, Secretary, Commission, dated December 11, 2017. See also Securities Exchange Act Release No. 82451 (January 5, 2018), 83 FR 1399 (January 11, 2018). The Participants withdrew Amendment No. 4 to the CAT NMS Plan on January 11, 2018. See Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Brent J. Fields, Secretary, Commission, dated January 10, 2018. See also Securities Exchange Act Release No. 82892 (March 16, 2018), 83 FR 12633 (March 22, 2018).

²⁵⁸ See FINRA Letter at 4.

²⁵⁹ Id.

²⁶⁰ Id. at 7, n.17.

²⁶¹ Id. at 2–4.

²⁶² See CAT Operating Committee July 14th Letter II at 4.

²⁶³ See LTSE Letter at 5; FINRA Letter at 6. See also NYSE Letter at 2 (describing the proposed allocation as part of “an incomprehensible, distorted program”); MMI Letter at 5 (requesting further transparency and discussion on cost allocation methodology differences between Participants and Industry Members).

the Proposed Amendment lacks justification to support the allocation.²⁶⁴ One commenter notes that the Participants previously stated that message traffic is a key cost driver of the CAT.²⁶⁵ The commenter attests that the Proposed Funding Model would assess Options Participants, which generate significantly more message traffic than Equities Participants, a lesser amount of the total CAT costs than Equities Participants.²⁶⁶ This commenter believes the result is inconsistent with the CAT's cost alignment principles²⁶⁷ and that the Operating Committee does not explain how the result is consistent with the funding principles or the Exchange Act.²⁶⁸ The other commenter believes the allocation is arbitrary and unfairly discriminatory.²⁶⁹ The commenter opines that the explanation provided by the Participants – that the allocation was “subject to negotiations among the Participants” – is not a basis for approval under the Exchange Act, and notes that the majority of votes on the Operating Committee are held by Participants that operate options exchanges.²⁷⁰

In response to the comments,²⁷¹ the Operating Committee states that the proposed 60%-40% allocation of costs between Equities Participants and Options Participants is an appropriate allocation that is consistent with the CAT NMS Plan, which contemplates allocating Participant CAT fees based on activity in options and equities, and explains that the allocation was the subject of negotiations among the Participants.²⁷²

²⁶⁴ See LTSE Letter at 5; FINRA Letter at 6.

²⁶⁵ See FINRA Letter at 6.

²⁶⁶ Id.

²⁶⁷ See Section 11.2(a) and Section 11.2(b) of the CAT NMS Plan.

²⁶⁸ See FINRA Letter at 6.

²⁶⁹ See LTSE Letter at 5.

²⁷⁰ Id.

²⁷¹ See FINRA Letter at 6; LTSE Letter at 5; MMI Letter at 5; NYSE Letter at 2.

²⁷² See CAT Operating Committee July 14th Letter II at 13–14.

Use of Message Traffic for Industry Members

Several commenters object to the use of message traffic as the basis of Industry Member CAT fees.²⁷³ One commenter believes that message traffic is not an appropriate measure for allocating fees to Industry Members.²⁷⁴ The commenter notes that the Participants “control how message traffic is defined, how message traffic is processed, and whether steps can be taken to reduce message traffic.”²⁷⁵ The commenter argues that charging only Industry Members based on message traffic is not a fair allocation of reasonable fees because it creates no incentive for the Participants to control CAT message traffic and CAT costs.²⁷⁶ The commenter believes the proliferation of exchanges has resulted in higher CAT message traffic, and thus higher costs, but notes that this is not analyzed in the funding model.²⁷⁷ Another commenter suggests that additional data is needed to support the apportionment of CAT costs according to message count.²⁷⁸

One commenter notes that the elimination of comparability as a funding principle removes support for the proposed requirement to base Industry Members CAT fees on message traffic and Participant CAT fees on market share.²⁷⁹ The commenter explains that comparability was key to the decision to propose message traffic as the basis of Industry Member CAT fees

²⁷³ See SIFMA Letter at 8–10; Istra Letter at 3, 5; Virtu Letter at 5; SSGA Letter at 2; Data Boiler Letter at 7. See also NYSE Letter at 1, 3 (recommending a cost allocation framework based on executed share volume) and STA Letter at 4 (agreeing with the suggestion to use executed share volume); Fidelity Letter at 4 (stating that the Proposed Amendment has not explained why Industry Members must pay CAT fees based on message traffic while Participants will pay based on market share).

²⁷⁴ See SIFMA Letter at 8–9.

²⁷⁵ Id. at 9.

²⁷⁶ Id.

²⁷⁷ Id.

²⁷⁸ See MMI Letter at 4.

²⁷⁹ See FINRA Letter at 3–4.

and market share as the basis of Execution Venue CAT fees when the Participants previously proposed CAT fees in 2017.²⁸⁰

Two commenters believe that the Proposed Funding Model needs to examine the impact of options quoting activity on CAT.²⁸¹ One commenter states that Options Market Maker quoting comprises the “vast majority” of CAT messaging and that the design of the CAT should be reevaluated in case CAT is being “weighed down by options activity with little impact on market quality and traded volume.”²⁸² The other commenter states that the Proposed Funding Model lacks an analysis of the message traffic and costs generated by Options Market Makers that are required by SRO rules to provide quotes in over a million options series, even those that do not trade.²⁸³

In response to comments questioning the use of message traffic as a basis of Industry Member CAT fees,²⁸⁴ the Operating Committee states that “the use of message traffic for allocating CAT costs among Industry Members is consistent with the CAT NMS Plan as approved by the Commission, and the proposal did not seek to change the use of message traffic for this purpose in the Proposed Funding Model.”²⁸⁵ The Operating Committee notes that it explored allocating the Industry Member Allocation based on revenue related to activities in Eligible Securities, but decided it would be difficult to determine the types of Industry Member revenue to include in the calculation of a CAT fee using this approach.²⁸⁶

One commenter suggests that the Reportable Events that will constitute message traffic be defined in the CAT NMS Plan, rather than in the IM Reporting Tech Specs, so that any

²⁸⁰ See supra note 257.

²⁸¹ See Istra Letter at 2; SIFMA Letter at 9.

²⁸² See Istra Letter at 2.

²⁸³ See SIFMA Letter at 9.

²⁸⁴ See Istra Letter at 4–5; MMI Letter at 4; SIFMA Letter at 8–9.

²⁸⁵ See CAT Operating Committee July 14th Letter II at 6.

²⁸⁶ Id.

changes to the Reportable Events that would be defined as message traffic would be subject to the notice and comment process.²⁸⁷ In response to the comment,²⁸⁸ the Operating Committee states that “delineating the method for reporting Reportable Events used in the message traffic count in the Technical Specifications, rather than the CAT NMS Plan, is appropriate because the technical approach to reporting specific Reportable Events may vary over time.”²⁸⁹

Commenters also believe that the use of message traffic as a basis of Industry Member CAT fees could affect market participant behavior with harmful consequences to the markets.²⁹⁰ Two commenters believe the Participants have not analyzed the impact of the proposed approach on the markets.²⁹¹ One commenter states that the Proposed Funding Model does not address whether market makers would reduce their quoting activity in order to reduce their CAT fees, even with the proposed market maker discounts.²⁹² The other commenter believes that such a reduction in message traffic could impact liquidity.²⁹³

One commenter believes that using message traffic as the basis of Industry Member CAT fees will hurt the provision of liquidity and harm market quality.²⁹⁴ The commenter explains, “[a] message that becomes displayed on an exchange has obvious value to the entire market and not only to the broker (or its customer) providing that liquidity. Taxing the message will naturally discourage its provision.”²⁹⁵ The commenter emphasizes the benefits of displayed

²⁸⁷ See Fidelity Letter at 2, 3.

²⁸⁸ Id.

²⁸⁹ See CAT Operating Committee July 14th Letter II at 6.

²⁹⁰ See SIFMA Letter at 9; Virtu Letter at 5; Istra Letter at 5; SSGA Letter at 2.

²⁹¹ See SIFMA Letter at 9; Virtu Letter at 5.

²⁹² See SIFMA Letter at 9.

²⁹³ See Virtu Letter at 5.

²⁹⁴ See Istra Letter at 5.

²⁹⁵ Id.

quoting on the markets and the negative consequences of the potential reduction in this activity that could result from the proposed approach.²⁹⁶

One commenter discusses the potential negative impact on ETFs caused by the use of message traffic as the basis for Industry Member CAT fees.²⁹⁷ The commenter believes that the proposed approach would result in a reduction in quoting to minimize CAT fees.²⁹⁸ The commenter states that ETF market making activity is message-intensive and any changes in behavior caused by the proposed approach could “interfere with the arbitrage mechanism and negate the work by Industry Members and exchanges to promote tighter bid-ask spreads, deeper markets and greater participation among liquidity providers.”²⁹⁹

In response to comments questioning the effects of the use of message traffic to calculate fees on the markets,³⁰⁰ the Operating Committee states that its proposed market maker discounts and the proposed Maximum Industry Member CAT Fee are designed to address potential disincentives. Additionally, the Operating Committee states that the market maker discounts “recognize the value of the market making activity to the market as a whole.”³⁰¹

Use of Market Share for Participants

Several commenters believe that Participants should be assessed fees based on message traffic rather than market share.³⁰² The commenters note that the primary driver of CAT costs is the processing and storage of message traffic; therefore, Participants should be assessed CAT fees based on message traffic.³⁰³

²⁹⁶

Id.

²⁹⁷

See SSGA Letter at 2.

²⁹⁸

Id.

²⁹⁹

Id.

³⁰⁰

See Istra Letter at –5; MMI Letter at 4; SIFMA Letter at 9; SSGA Letter at 2; Tower Letter at 1; Virtu Letter at 5.

³⁰¹

See CAT Operating Committee July 14th Letter II at 7.

³⁰²

See FIA PTG May 12th Letter at 3; LTSE Letter at 2–3; FINRA Letter at 6–7, 9.

³⁰³

See FIA PTG May 12th Letter at 3; LTSE Letter at 2; FINRA Letter at 6–7, 9.

One commenter believes that using market share to determine Participant CAT fees “gives a free pass to Plan Participants who generate high levels of message traffic but have very little market share.”³⁰⁴ This commenter believes that using message traffic as the basis of Industry Member CAT fees and market share as the basis of Participant CAT fees is inherently discriminatory, maximizes Industry Member costs and minimizes Participant costs, and appears to result from Participant conflicts of interest and a lack of industry input until the funding model.³⁰⁵ Another commenter believes that using message traffic as the basis of Industry Member CAT fees and market share as the basis of Participant CAT fees is discriminatory and unsupportable.³⁰⁶ One commenter believes the Proposed Amendment fails to explain why Industry Members will be assessed fees based on message traffic while Participants will be assessed fees based on market share.³⁰⁷ Two commenters believe that the Participants will have no incentives to limit message traffic to lower costs if they are not being charged CAT fees based on message traffic.³⁰⁸

Another commenter, FINRA, believes that requiring market share to be the basis of Participant costs is inconsistent with CAT cost alignment principles³⁰⁹ because message traffic is the key driver of costs, not market share.³¹⁰ The commenter notes that if the Participants believe

³⁰⁴ See FIA PTG May 12th Letter at 3. See also SIFMA Letter at 9 (stating that message traffic is a key driver of CAT costs and that the Participants generate a significant amount of message traffic, yet the Participants propose to base their own CAT fees on market share). See also Parallax Letter at 3 (recommending an analysis of the amount of message traffic that is driven by the Participants, such as market maker quoting).

³⁰⁵ See FIA PTG May 12th Letter at 3.

³⁰⁶ See IMC Letter at 2.

³⁰⁷ See Fidelity Letter at 4. See also LTSE Letter at 2–3 (stating that the Participants have provided no metrics to support their rationale that message traffic is not an appropriate basis for Participant CAT fees because their message traffic is derivative of quotes and orders received from Industry Members that the Participants are required to display) and NYSE Letter at 2 (stating that the Proposed Amendment does not justify why some costs should be split by message traffic and other costs should be split by market share).

³⁰⁸ See Virtu Letter at 5; LTSE Letter at 3.

³⁰⁹ See *supra* note 267.

³¹⁰ See FINRA Letter at 6.

FINRA's CAT fee would be too low based on its message traffic, FINRA would consider paying a more appropriate amount or an allocation based on a combination of message traffic and market share.³¹¹

This commenter also objects to the use of market share in determining its CAT fees.³¹² The commenter states that it would be responsible for 20% of the Equities Participant Allocation even though it generates less than 1% of equities message traffic reported to the CAT.³¹³ The commenter explains that its market share would be based on trade reporting volume reported through its facilities, which is also reported by Industry Members.³¹⁴ The commenter asks how this is consistent with the Operating Committee's rationale for the use of market share to determine Participant CAT fees – that message traffic is not an appropriate basis for Participants because their message traffic is derivative of Industry Member reporting activity.³¹⁵ In addition, the commenter states that the Operating Committee justifies the use of market share for Participants because their business models are focused on executions; however, the commenter notes that “given FINRA's unique role, trade volume is reported through FINRA for regulatory purposes, not to serve FINRA's business purposes.”³¹⁶ The commenter adds that the Operating Committee justifies the use of market share as a basis for FINRA's CAT fees as FINRA would be one of the largest regulatory users of the CAT.³¹⁷ The commenter asks “why regulatory usage is offered only to justify FINRA's allocation of the proposed fee that is based on unrelated criteria (market share), particularly when all Participants may use CAT data for regulatory

³¹¹ Id. at 9.

³¹² Id. at 7–9.

³¹³ Id. at 8.

³¹⁴ Id. at 7.

³¹⁵ Id. at 7.

³¹⁶ See FINRA Letter at 7–8.

³¹⁷ Id. at 8.

purposes.”³¹⁸ The commenter argues that the Operating Committee has not analyzed the costs of regulatory usage, and states that if a regulatory usage fee is appropriate, it should apply to all Participants.³¹⁹

In response to comments questioning the use of market share to calculate Participant fees,³²⁰ the Operating Committee states that the CAT NMS Plan contemplates that Participants pay a CAT fee that is based on market share. After considering alternatives to the use of market share, the Operating Committee concluded that market share would equitably allocate CAT fees among Participants. The Operating Committee reiterates arguments it made in support of the use of market share in the Proposed Amendment.³²¹

Maximum Equities Participant Fee

Two commenters object to the Maximum Equities Participant Fee because they believe that the sole Participant subject to the fee – FINRA – would be unfairly afforded preferential treatment.³²² One commenter believes that FINRA should receive a higher portion of CAT costs than Participants that lack a surveillance business because FINRA can capitalize off of the predecessor plan processor’s development work and its technology will benefit from CAT.³²³ The commenter believes that FINRA should not be permitted re-allocation of its CAT fee under the Maximum Equities Participant Fee.³²⁴ The commenter also states, “[a]lthough we acknowledge that the nature of OTC trading in penny level may inherently be different from the proposed message traffic measurement use in Equity / Listed Option Group Split, similar

³¹⁸ Id.

³¹⁹ Id. at 8–9.

³²⁰ See FIA PTG May 12th Letter at 3; Fidelity Letter at 4; FINRA Letter at 6–7; IMC Letter at 2; LTSE Letter at 2–3; MMI Letter at 5; NYSE Letter at 2; SIFMA Letter at 8–9.

³²¹ See CAT Operating Committee July 14th Letter II at 12–13; Notice, supra note 4, at 21060.

³²² See Data Boiler Letter at 8–9; LTSE Letter at 5. See also NYSE Letter at 2 (noting the added complexity of the “bespoke fee structure for FINRA”).

³²³ See Data Boiler Letter at 8–9.

³²⁴ Id. at 9.

arguments may apply to thinly traded securities, ESG stocks, etc., which SEC rule should avoid ‘craft-out.’”³²⁵

In response to the comment noting the nature of trading in OTC Equity Securities,³²⁶ the Operating Committee states that it proposes to exclude OTC Equity Securities share volume from the calculation of market share for national securities exchanges. The Operating Committee reiterates the arguments it made in support of the proposed exclusion of OTC Equity Securities share volume in the Proposed Amendment.³²⁷

The other commenter believes that the Maximum Equities Participant Fee market share caps and re-allocation are arbitrary and unfairly discriminatory.³²⁸ The commenter believes that the proposal lacks justification for requiring other Equities Participants to be allocated FINRA’s market share when FINRA’s activity does not occur on their markets.³²⁹ The commenter notes, “[t]he stated rationale that this is necessary for the FINRA fees to be ‘fair and reasonable’ is subjective, unsupported by any data, and further highlights the shortcomings of a fee model based on market share.”³³⁰

One commenter, FINRA, also objects to the Maximum Equities Participant Fee because it is based on the use of market share for calculating FINRA’s CAT fees, which FINRA believes is inconsistent with the funding principles of the CAT NMS Plan and ill-suited to FINRA’s unique model.³³¹

³²⁵ Id. at 8.

³²⁶ Id.

³²⁷ See CAT Operating Committee July 14th Letter II at 14; Notice, supra note 4, at 21061.

³²⁸ See LTSE Letter at 5.

³²⁹ Id.

³³⁰ Id.

³³¹ See supra text accompanying notes 312–319.

In response to comments received on the Maximum Equities Participant Fee,³³² the Operating Committee reiterates the arguments it made in support of the proposed Maximum Equities Participant Fee in the Proposed Amendment.³³³

Minimum Participant Fee

One commenter objects to the proposed Minimum Participant Fee as inconsistent with the notion that market share is a fair method of allocation,³³⁴ and as arbitrary and unfairly discriminatory.³³⁵ The commenter states that this fee would be paid by every Participant, regardless of its market share, and notes that this fee can significantly increase even if a Participant itself is not creating increased costs to the CAT.³³⁶ The commenter questions why some Participants would incur a higher Minimum Participant Fee when only certain Participants engage in activity that results in increased CAT message traffic.³³⁷ The commenter also notes that a Participant that operates both an options and equities exchange would be assessed only one Minimum Participant Fee.³³⁸

In response to the comments on the Minimum Participant Fee,³³⁹ the Operating Committee reiterates the arguments it made in support of the proposed Minimum Participant Fee in the Proposed Amendment.³⁴⁰

³³² See Data Boiler Letter at 9; FINRA Letter at 7–9; LTSE Letter at 5; NYSE Letter at 2.

³³³ See CAT Operating Committee July 14th Letter II at 15; Notice, supra note 4, at 21062.

³³⁴ See LTSE Letter at 4.

³³⁵ See LTSE Letter at 4. See also NYSE Letter at 2 (noting the added complexity of the Minimum Participant Fee).

³³⁶ See LTSE Letter at 4.

³³⁷ Id. at 4–5.

³³⁸ Id. at 4, n.9.

³³⁹ Id. at 4–5; NYSE Letter at 2.

³⁴⁰ See CAT Operating Committee July 14th Letter II at 15; Notice, supra note 4, at 21060.

Maximum Industry Member CAT Fee

Several commenters express concern about the Maximum Industry Member CAT Fee.³⁴¹ One commenter believes the Maximum Industry Member CAT Fee “exacerbates inequalities”³⁴² and believes that small firms should not be responsible for subsidizing the CAT fees for the top 36 firms that generate the vast majority of message traffic.³⁴³ Similarly, another commenter believes that a lack of transparency into the re-allocation of CAT fees for Industry Members in excess of the Maximum Industry Member CAT Fee adds complexity and makes it difficult for Industry Members to calculate their costs under the Proposed Funding Model.³⁴⁴ This commenter also believes the cap of 8% of total Industry Member CAT message traffic is arbitrary.³⁴⁵

Another commenter objects to the 8% cap, explaining that the proposal has not fully justified the cap, and that it provides large brokers an unfair advantage by requiring other Industry Members, including their direct competitors, to pay the large brokers’ re-allocation of fees in excess of the Maximum Industry Member CAT Fee.³⁴⁶ Finally, one commenter believes the Proposed Funding Model insufficiently analyzes the “cross-subsidization that results from the proposed minimum and maximum Industry Member fees” nor does it explain the reasoning behind the creation of the Maximum Industry Member CAT Fee.³⁴⁷

³⁴¹ See Data Boiler Letter at 7-8; Tower Letter at 6; FINRA Letter at 5–6; MMI Letter at 5; SIFMA Letter at 9.

³⁴² See Data Boiler Letter at 7.

³⁴³ Id.

³⁴⁴ See SIFMA Letter at 9.

³⁴⁵ Id.

³⁴⁶ See Tower Letter at 6.

³⁴⁷ See FINRA Letter at 5.

In response to comments on the Maximum Industry Member CAT Fee,³⁴⁸ the Operating Committee reiterates the arguments it made in support of the proposed Maximum Industry CAT Fee in the Proposed Amendment.³⁴⁹

Minimum Industry Member CAT Fee

Two commenters object to the Minimum Industry Member CAT Fee.³⁵⁰ One of the commenters believes the Minimum Industry Member CAT Fee poses an undue burden on Industry Members and, by charging a “de minimis fee,” is inconsistent with Section 11.2(d), which requires the Operating Committee to provide for ease of billing and other administrative functions.³⁵¹

The other commenter believes the proposal lacks justification for the Minimum Industry CAT Fee, explaining that the fee could increase for firms with little message traffic due to the redistribution of CAT fees in excess of the Maximum Industry Member CAT Fee.³⁵² The commenter states this result was not discussed in the Proposed Funding Model nor was there a discussion of how the result is consistent with the CAT funding principles.³⁵³

In response to the comments,³⁵⁴ the Operating Committee reiterates the arguments it made in support of the proposed Minimum Industry Member CAT Fee in the Proposed Amendment.³⁵⁵

³⁴⁸ See Data Boiler Letter at 7–8; FINRA Letter at 5–6; MMI Letter at 5; SIFMA Letter at 9; Tower Letter at 6.

³⁴⁹ See CAT Operating Committee July 14th Letter II at 12; Notice, supra note 4, at 21059.

³⁵⁰ See Data Boiler Letter at 7; FINRA Letter at 5–6.

³⁵¹ See Data Boiler Letter at 7.

³⁵² See FINRA Letter at 5–6.

³⁵³ See FINRA Letter at 5–6.

³⁵⁴ See Data Boiler Letter at 7; FINRA Letter at 5–6.

³⁵⁵ See CAT Operating Committee July 14th Letter II at 7; Notice, supra note 4, at 21058–21059.

Market Maker Discounts

Five commenters object to the proposed market maker discounts.³⁵⁶ One commenter objects to the market maker discounts due to what it deems the improper discounting of Equity Market Maker message traffic and the preferential treatment of Options Market Makers at the expense of equities Industry Members.³⁵⁷ The commenter criticizes the trade-to-quote ratio that is the basis of the proposed market maker discounts, explaining that it “ignores the realities of the market.”³⁵⁸ The commenter suggests only including trades executed on-exchange and not off-exchange in the ratio.³⁵⁹ Additionally, the commenter objects to the use of the SIP best bid and offer information in deriving the trade-to-quote ratio, explaining that this method undercounts the “activity and value contribution of equities market makers and further underestimates any market maker discount.”³⁶⁰ The commenter also argues that, after the Options Market Maker discount, equities Industry Members would be required to pay 95% of the CAT cost when only responsible for 12% of the message traffic, a “grossly unfair cross-subsidy.”³⁶¹ The commenter states that at least 40% of Industry Member costs should be borne by options Industry Members if message traffic is the key driver of CAT costs.³⁶² Another commenter states that the “massive discounts” demonstrate that the Participants “have not found a way to perform the core functions needed for market surveillance, without the cost of it putting at risk an entire segment of the industry.”³⁶³

³⁵⁶ See Data Boiler Letter at 7, 8, 9; SIFMA Letter at 9; Tower Letter at 5–6; Istra Letter at 3–5; Parallax Letter at 3.

³⁵⁷ See Istra Letter at 3–5.

³⁵⁸ Id. at 4–5. See also Parallax Letter at 3 (stating that the trade-to-quote ratio needs further analysis).

³⁵⁹ See Istra Letter at 4.

³⁶⁰ Id. at 5.

³⁶¹ Id. at 4.

³⁶² Id.

³⁶³ See Parallax Letter at 3. This commenter also suggests that there should be a process to confirm that Industry Members accurately identify themselves as market makers to

Similarly, another commenter states that 89% of all Industry Member CAT Reportable Events comes from Options Market Makers, but the proposed Options Market Maker discount reduces 99% of the billable events for Options Market Makers, with the result being 94% of Industry Members' share allocated to equities non-market makers.³⁶⁴ The commenter urges the Participants to justify this shift of costs to Industry Members that are not Options Market Makers and notes that the Proposed Amendment has not analyzed the effects of the discounts or has demonstrated that the discounts will be effective.³⁶⁵ The commenter states that the Proposed Amendment is lacking in several other areas with respect to these discounts; there is no discussion of: (1) how the proposed market maker discount provides a pricing advantage to market makers that is unavailable to other market participants; (2) how the trade-to-quote ratio is the correct metric to use for determining the market maker discounts; (3) how the discount incentivizes market makers to quote more without trading more; (4) how/whether the discount calculation will change if the trade-to-quote ratio significantly changes; and (5) any impacts on liquidity and market participant behavior.³⁶⁶ The commenter also believes the Proposed Amendment lacks a discussion of its potential impact on business lines across the industry, such as, for example, its effect on ATSS, which would not be considered market makers and thus could incur high costs.³⁶⁷ The commenter attests that the Proposed Amendment lacks the information necessary to assess the effect of the proposed market maker discounts, such as the number of transactions resulting from market makers and how market-makers transactions should be discounted from the total number of transactions using the trade-to-quote ratio.³⁶⁸

receive the proposed market maker discounts, and penalties for those who wrongfully identify themselves or their activities to receive a discount. Id.

³⁶⁴ See Tower Letter at 6.

³⁶⁵ Id. at 5–6. See also Parallax Letter at 4 (stating that it is important to understand the extent to which Industry Members would benefit from the discounts).

³⁶⁶ See Tower Letter at 5.

³⁶⁷ Id. at 6.

³⁶⁸ Id. at 3.

In response to the comment on the proposal's potential effects on business lines across the industry,³⁶⁹ the Operating Committee states that it sought to limit any negative effects on certain CAT Reporters resulting from the use of message traffic to calculate fees, such as through the proposed market maker discounts and the proposed Maximum Industry Member CAT Fee.³⁷⁰

One commenter opposes any market maker discounts, but notes that smaller market makers that do not pay or receive rebates deserve subsidies to encourage their participation.³⁷¹ Another commenter believes the impact of market maker discounts, as well as the Maximum Industry Member CAT Fee, adds complexity and makes it difficult for Industry Members to calculate their costs.³⁷² In response to comments on the market maker discounts,³⁷³ the Operating Committee reiterates its rationale for proposing the discounts from the Proposed Amendment.³⁷⁴

Two commenters endorse the proposed market maker discounts.³⁷⁵ One commenter believes any funding plan should include these discounts and that additional product-specific discounts should be considered.³⁷⁶ Another commenter believes the discounts prevent market makers from incurring “a disproportionate percentage of CAT costs, which could impact their provision of liquidity.”³⁷⁷

One commenter requests clarification on the proposed market maker discounts, specifying “cost allocation data and projections on market maker vs. non-market maker liquidity

³⁶⁹ Id. at 6.

³⁷⁰ See CAT Operating Committee July 14th Letter II at 7.

³⁷¹ See Data Boiler Letter at 9.

³⁷² See SIFMA Letter at 9.

³⁷³ See FIA PTG May 12th Letter at 4; IMC Letter at 2; Data Boiler Letter at 7; SIFMA Letter at 9; Istra Letter at 2–4; Parallax Letter at 3; Tower Letter at 5–6.

³⁷⁴ See CAT Operating Committee July 14th Letter II at 9; Notice, supra note 4, at 21057–21058.

³⁷⁵ See IMC Letter at 2; FIA PTG May 12th Letter at 4.

³⁷⁶ See IMC Letter at 2.

³⁷⁷ See FIA PTG May 12th Letter at 4.

providers.”³⁷⁸ The commenter also asks for further transparency and discussion on the application of the discounts on Industry Members with the most message traffic, at the expense of other Industry Members.³⁷⁹

Proposed Alternative Funding Models

Several commenters suggest alternatives to the Proposed Funding Model.³⁸⁰ One commenter believes that fines and settlements should fund the CAT and that market participants that pose higher risks should pay higher CAT fees due to regulators’ “extra efforts in deciphering their complex business activities.”³⁸¹ The commenter also suggests the Suspicious Activity Report (“SAR”)³⁸² as a basis for determining Industry Member CAT fees, stating that Industry Members that underreport on the SAR should have increased fines.³⁸³ The commenter believes that dark pools should pay higher CAT fees than SROs because they pose higher potential risks due to lack of transparency and “vulnerability to conflicts of interest,”³⁸⁴ and also notes that internalizers or market makers may pose more of a risk than dark pools due to greater vulnerability to conflicts of interest.³⁸⁵

³⁷⁸ See MMI Letter at 5.

³⁷⁹ Id.

³⁸⁰ See NYSE Letter at 2–5; Data Boiler Letter at 7–8; STA Letter at 4; FIA PTG May 12th Letter at 4; Istra Letter at 5–6; IMC Letter at 3; MMI Letter at 5.

³⁸¹ See Data Boiler Letter at 8.

³⁸² 12 CFR 21.11.

³⁸³ See Data Boiler Letter at 7–8.

³⁸⁴ Id.

³⁸⁵ Id. In response to this comment, the Operating Committee states that the Proposed Funding Model would treat ATSs as Industry Members, requiring all Industry Members to pay a fee based on message traffic rather than requiring some ATSs to pay a fee based on market share and some ATSs to pay a fee based on message traffic, and would also address concerns that treating Execution Venue ATSs as Participants could create a barrier to entry for smaller ATSs. See CAT Operating Committee July 14th Letter II at 7–8.

Other commenters recommend a funding model administered similar to the Commission's Section 31 fees.³⁸⁶ Two commenters explain that the Participants could be assigned all of the CAT costs and then they would decide how to reallocate those costs to their market participants, like Section 31 fees.³⁸⁷ One of the commenters believes that this method would incentivize Participants into better managing CAT costs and possibly incentivize them into competing over how to allocate costs their market participants.³⁸⁸ Another commenter also suggests that the Commission could instead increase the rate of Section 31 fees to fund the CAT.³⁸⁹

One commenter believes that a 50%-50% cost allocation among Industry Members and Participants would be preferable to the proposed 75%-25% cost allocation,³⁹⁰ but notes a simpler and direct way of allocating costs through derived value, which the commenter believes would not deter the provision of liquidity.³⁹¹ The commenter suggests using a methodology similar to the Section 31 fee or the Section 31 fee methodology itself.³⁹²

Another commenter, a national securities exchange, provides a detailed alternative funding model administered similarly to Section 31 fees.³⁹³ According to the alternative model, CAT costs would be allocated based on executed share volume, which is already tracked by market participants.³⁹⁴ A per share or per contract fee would be calculated by dividing the

³⁸⁶ See MMI Letter at 5; Istra Letter at 5–6; FIA PTG May 12th Letter at 4; IMC Letter at 2–3; STA Letter at 4; NYSE Letter at 2–5.

³⁸⁷ See MMI Letter at 5; FIA PTG May 12th Letter at 4.

³⁸⁸ See FIA PTG May 12th Letter at 4.

³⁸⁹ See MMI Letter at 5.

³⁹⁰ See Istra Letter at 5.

³⁹¹ Id. at 5–6.

³⁹² Id.

³⁹³ See NYSE Letter at 2–5.

³⁹⁴ Id. at 3.

annual budget cost base by projected total industry volume.³⁹⁵ One-third of the fee would be allocated to the purchasing broker-dealer, one-third to the selling broker-dealer, and one-third to the exchange or trade reporting facility reporting the transaction.³⁹⁶ The commenter believes that this allocation would align funding responsibility with the receipt of economic benefits from the marketplace and would result in transparent and predictable CAT funding costs.³⁹⁷ The commenter notes that OTC equities would be treated differently due to their significantly higher share volumes, and suggests that they receive a small portion of the CAT budget that would be allocated among the buyer, seller and the Over-the-Counter Reporting Facility on a per share basis.³⁹⁸ The commenter believes that requiring all parties active in each transaction to evenly fund the CAT would allocate costs transparently, and that billing in accordance with Section 31 fee billing processes would be “an efficient method to administer funding program and provide clarity to market participants of their trading expenses.”³⁹⁹

Two commenters believe the national securities exchange’s suggested alternative funding model deserves review.⁴⁰⁰ Both commenters support the alternative’s suggestion to base funding on executed volume rather than message traffic via a structure administered like Section 31 fees volume rather than message traffic.⁴⁰¹ However, one commenter expresses concern about the alternative’s suggested allocation of the per share cost, explaining that FINRA’s costs would be passed to Industry Members through the TAF.⁴⁰² Additionally, one commenter warns that this alternative, and the suggestions to use Section 31 fees as a model, could result in costs assessed

³⁹⁵ Id.

³⁹⁶ Id.

³⁹⁷ Id.

³⁹⁸ Id.

³⁹⁹ See NYSE Letter at 5.

⁴⁰⁰ See IMC Letter at 3; STA Letter at 4.

⁴⁰¹ See IMC Letter at 2–3; STA Letter at 4.

⁴⁰² See STA Letter at 4.

against investors and urges the Commission to consider the possibility of increased costs and whether investors should be responsible for these costs.⁴⁰³

V. Proceedings to Determine Whether to Approve or Disapprove the Proposed Amendment

The Commission is instituting proceedings pursuant to Rule 608(b)(2)(i) of Regulation NMS,⁴⁰⁴ and Rules 700 and 701 of the Commission's Rules of Practice,⁴⁰⁵ to determine whether to disapprove the Proposed Amendment or to approve the Proposed Amendment with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the Proposed Amendment to inform the Commission's analysis.

Rule 608(b)(2) of Regulation NMS provides that the Commission "shall approve a national market system plan or proposed amendment to an effective national market system plan, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act."⁴⁰⁶ Rule 608(b)(2) further provides that the Commission shall disapprove a national market system plan or proposed amendment if it does not make such a finding.⁴⁰⁷ In the Notice, the Commission sought comment on the Proposed Amendment, including whether the Proposed Amendment is consistent with the Exchange

⁴⁰³ See Parallax Letter at 4–5.

⁴⁰⁴ 17 CFR 242.608.

⁴⁰⁵ 17 CFR 201.700; 17 CFR 201.701.

⁴⁰⁶ 17 CFR 242.608(b)(2).

⁴⁰⁷ Id.

Act.⁴⁰⁸ In this order, pursuant to Rule 608(b)(2)(i) of Regulation NMS,⁴⁰⁹ the Commission is providing notice of the grounds for disapproval under consideration:

- Whether, consistent with Rule 608 of Regulation NMS, the Participants have demonstrated how the Proposed Amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act;⁴¹⁰
- Whether the Participants have demonstrated how the Proposed Amendment is consistent with Section 6(b)(4)⁴¹¹ and Section 15A(b)(5),⁴¹² of the Exchange Act, which require that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities” and that the rules of a national securities association “provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls;”

⁴⁰⁸ See Notice, supra note 4.

⁴⁰⁹ 17 CFR 242.608(b)(2)(i).

⁴¹⁰ 17 CFR 242.608(b)(2).

⁴¹¹ 15 U.S.C. 78f(b)(4).

⁴¹² 15 U.S.C. 78o-3(b)(5).

- Whether the Participants have demonstrated how the Proposed Amendment is consistent with Section 6(b)(5)⁴¹³ and Section 15A(b)(6),⁴¹⁴ of the Exchange Act, which require that the rules of a national securities exchange or national securities association “promote just and equitable principles of trade... protect investors and the public interest; and [to be] not designed to permit unfair discrimination between customers, issuers, brokers, or dealers;”
- Whether the Participants have demonstrated how the Proposed Amendment is consistent with Section 6(b)(8)⁴¹⁵ and Section 15A(b)(9)⁴¹⁶ of the Exchange Act, which require that the rules of a national securities exchange or national securities association “do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act];”
- Whether the Participants have demonstrated how the Proposed Amendment is consistent with the funding principles of the CAT NMS Plan, which state that the Operating Committee shall seek, among other things, “to create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company,”⁴¹⁷ “to establish an allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company resources and operations,”⁴¹⁸ “to provide for ease of billing and other

⁴¹³ 15 U.S.C. 78f(b)(5)

⁴¹⁴ 15 U.S.C. 78o-3(b)(6).

⁴¹⁵ 15 U.S.C. 78f(b)(8).

⁴¹⁶ 15 U.S.C. 78o-3(b)(9).

⁴¹⁷ Section 11.2(a) of the CAT NMS Plan.

⁴¹⁸ Section 11.2(b) of the CAT NMS Plan.

administrative functions,”⁴¹⁹ and “to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality;”⁴²⁰

- Whether, and if so how, the Proposed Amendment would affect efficiency, competition or capital formation; and
- Whether modifications to the Proposed Amendment, or conditions to its approval, would be necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act.⁴²¹

As discussed in Section IV., above, the Participants made various arguments in support of the Proposed Amendment and the Commission received comment letters that expressed concerns about the Proposed Amendment, including that the Participants did not provide sufficient information to establish that the Proposed Amendment is consistent with the Exchange Act and the rules thereunder.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder... is on the plan participants that filed the NMS plan filing.”⁴²² The description of the NMS plan filing, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.⁴²³ Any failure of the plan participants that filed the NMS plan filing to provide such detail and specificity may result in the Commission not having a sufficient basis to make an

⁴¹⁹ Section 11.2(d) of the CAT NMS Plan.

⁴²⁰ Section 11.2(e) of the CAT NMS Plan.

⁴²¹ 17 CFR 242.608(b)(2).

⁴²² 17 CFR 201.701(b)(3)(ii).

⁴²³ Id.

affirmative finding that the NMS plan filing is consistent with the Exchange Act and the applicable rules and regulations thereunder.⁴²⁴

VI. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposed Amendment. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Amendment is consistent with Section 11A or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 608(b)(2)(i) of Regulation NMS,⁴²⁵ any request for an opportunity to make an oral presentation.⁴²⁶ The Commission asks that commenters address the sufficiency and merit of the Participants' statements in support of the Proposed Amendment,⁴²⁷ in addition to any other comments they may wish to submit about the proposed rule changes. In particular, the Commission seeks comment on the following:

A. Requests for comment on the Proposed Funding Model:

1. Commenters' views on the proposed inclusion of ATSS as Industry Members for purposes of allocating CAT costs;
2. Commenters' views on the exclusion of reported OTC Equity Securities share volume from the calculation of market share for national securities associations;

⁴²⁴ Id.

⁴²⁵ 17 CFR 242.608(b)(2)(i).

⁴²⁶ Rule 700(c)(ii) of the Commission's Rules of Practice provides that "[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views." 17 CFR 201.700(c)(ii).

⁴²⁷ See Notice, supra note 4.

3. Commenters' views on the proposed elimination of tiered fees in favor of CAT fees that may vary based on message traffic or market share, as applicable;
4. Commenters' views on the proposed elimination from Section 11.2(c) of the CAT NMS Plan of the requirement that the fees charged to CAT Reporters with the most CAT-related activity be generally comparable;
5. Commenters' views on the proposed Minimum Industry Member CAT Fee and the requirement that all Industry Members pay such fee, even if they have not yet started reporting to the CAT, and any views on whether the Proposed Funding Model has provided sufficient information on the operation of the fee and on whether the Proposed Funding Model has sufficiently explained the operation of the Minimum Industry Member CAT Fee Re-Allocation;
6. Commenters' views on the proposed Maximum Industry Member CAT Fee; any views on whether the Proposed Amendment contains sufficient justification for the 8% cap chosen for the fee; and any views on whether a maximum fee is consistent with the funding principles expressed in the CAT NMS Plan that states that the Operating Committee shall seek, among other things, "to create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company,"⁴²⁸ "to establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants

and Industry Members and their relative impact upon the Company resources and operations,”⁴²⁹ and “to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality;”⁴³⁰

7. Commenters’ views on why Industry Member CAT fees should be capped; views on how such a cap would benefit or harm efficiency, competition, and capital formation; and any views on whether there are other benefits or costs of adopting such an approach;
8. Commenters’ views on the proposed Minimum Participant Fee and the Maximum Equities Participant Fee, including views on the calculation of the proposed fees and any views on whether the proposed fees raise any competitive issues among the Participants; and any views on whether the proposed fees are consistent with the funding principles expressed in the CAT NMS Plan, which state that the Operating Committee shall seek, among other things, “to create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company;”⁴³¹ “to establish an allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company resources and operations;”⁴³² and “to avoid any disincentives such as

⁴²⁹ Section 11.2(b) of the CAT NMS Plan.

⁴³⁰ Section 11.2(e) of the CAT NMS Plan.

⁴³¹ Section 11.2(a) of the CAT NMS Plan.

⁴³² Section 11.2(b) of the CAT NMS Plan.

placing an inappropriate burden on competition and a reduction in market quality;”⁴³³

9. Commenters’ views on whether FINRA’s CAT fee should be capped; any views on how such a cap benefits or harms efficiency, competition, and capital formation; and any views on whether there are other benefits or costs of adopting such an approach;
10. Commenters’ views on why Participants should be charged the Minimum Participant Fee; views on how such a minimum would benefit or harm efficiency, competition, and capital formation; and any views on whether there are other benefits or costs of adopting such an approach;
11. Commenters’ views on the proposed market maker discounts, any views on the potential impact of the discounts on market participant behavior, including the provision of liquidity; and any views on whether the proposed market maker discounts are consistent with the funding principles expressed in the CAT NMS Plan, which state that the Operating Committee shall seek, among other things, “to create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company,”⁴³⁴ “to establish an allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company resources and operations,”⁴³⁵ and “to avoid any

⁴³³ Section 11.2(e) of the CAT NMS Plan.

⁴³⁴ Section 11.2(a) of the CAT NMS Plan.

⁴³⁵ Section 11.2(b) of the CAT NMS Plan.

disincentives such as placing an inappropriate burden on competition and a reduction in market quality;”⁴³⁶

12. Commenters’ views on how market-making activity should be defined for purposes of the proposed market maker discounts; views on whether there is activity included in the definition of market making that should not be included for purposes of allocation of CAT fees; and any views on whether such a discount should apply to market-making activities in all types of securities without regard to security characteristics;
13. Commenters’ views on whether other Industry Members (including those that do not transact in options) would subsidize the activity of Options Market Makers under the proposal; any views on whether Section 6.4(d)(iii)⁴³⁷ of the CAT NMS Plan effectively reduces the message traffic of Options Market Makers relative to what it would be otherwise, and thus ultimately reduce the CAT fees they would be assigned under the Participants’ proposal; views on how this subsidization would benefit or harm efficiency, competition, and capital formation; views on whether there are other benefits or costs of adopting such an approach; views (in detail) on whether there is an alternative approach that would be more beneficial to efficiency, competition, or capital formation; and any views

⁴³⁶ Section 11.2(e) of the CAT NMS Plan.

⁴³⁷ Section 6.4(d)(iii) of the CAT NMS Plan states, “With respect to the reporting obligations of an Options Market Maker with regard to its quotes in Listed Options, Reportable Events required pursuant to Section 6.3(d)(ii) and (iv) shall be reported to the Central Repository by an Options Exchange in lieu of the reporting of such information by the Options Market Maker. Each Participant that is an Options Exchange shall, through its Compliance Rule, require its Industry Members that are Options Market Makers to report to the Options Exchange the time at which a quote in a Listed Option is sent to the Options Exchange (and, if applicable, any subsequent quote modifications and/or cancellation time when such modification or cancellation is originated by the Options Market Maker). Such time information also shall be reported to the Central Repository by the Options Exchange in lieu of reporting by the Options Market Maker.”

on whether the discount to fees allocated to Industry Members for market making activity described in the Participants' proposal provide a similar magnitude of benefit to Equity Market Makers;

B. Requests for comment on the Proposed Fee Schedule:

1. Commenters' views on the determination to allocate 75% of the Total CAT Costs to Industry Members and 25% of the Total CAT Costs to Participants; and any views on whether this proposed allocation is consistent with the funding principles expressed in the CAT NMS Plan, which state that the Operating Committee shall seek, among other things, "to establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company resources and operations,"⁴³⁸ and "to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁴³⁹;
2. Commenters' views on the rationale provided that the proposed 75%-25% allocation ensures that Industry Members with the most message traffic pay comparable fees to Participant complexes with the most market share, considering the proposed deletion from Section 11.2(c) of the CAT NMS Plan of the requirement that the fees charged to CAT Reporters with the most CAT-related activity be generally comparable;
3. Commenters' views on whether allocating Participant fees by market share while allocating Industry Member fees by message traffic, when combined with the proposed 75%-25% split between Participants and Industry Member

⁴³⁸ Section 11.2(b) of the CAT NMS Plan.

⁴³⁹ Section 11.2(e) of the CAT NMS Plan.

aggregate fees, introduces frictions (such as effectively double counting the message traffic sent and received by Industry Members, into the CAT fee model due to FINRA's allocation of fees from trade volume reported to trade reporting facilities); views on how frictions would result; any views on how this would benefit or harm efficiency, competition, and capital formation; any views on whether there are other benefits or costs of adopting such an approach; and any views on whether capping FINRA's contribution to CAT fees as described in the Participants' proposal mitigate any benefits or costs and to what extent;

4. Commenters' views on potential alternative allocations of Total CAT Costs to Industry Members and Participants, including the allocations considered, but rejected, by the Participants, and the alternative allocations suggested by commenters as discussed in this order;
5. Commenters' views on how fees would be passed on to Industry Members and investors if all CAT costs were allocated to Participants; views on how this outcome would be different than under the Participants' proposal; views on whether such an approach would benefit or harm efficiency, competition, and capital formation; and any views on whether there are other benefits or costs of adopting such an approach;
6. Commenters' views on whether Industry Members have sufficient information to estimate and budget for their expected allocation of CAT fees each quarter; if not, any views on what additional information would Industry Members need to develop an estimate of these fees;
7. Commenters' views on whether a Section 31 fee-like cost allocation framework (i.e., a transaction-based fee framework) would benefit or harm

efficiency, competition, and capital formation, and any views on whether there are other benefits or costs of adopting such an approach;

8. Commenters' views on the calculation of the Participant Allocation and the Adjusted Participant Allocation;

9. Commenters' views on the determination to allocate 60% of the Adjusted Participant Allocation to Equities Participants and 40% to Options Participants, including views on whether the proposed allocation is consistent with the funding principles expressed in the CAT NMS Plan that state that the Operating Committee shall seek, among other things, "to establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company resources and operations,"⁴⁴⁰ and "to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁴⁴¹

10. Commenters' views on an alternative approach that would split costs between Participants and Industry Members by proportion of aggregate message traffic, then allocate the Participants' portion of fees across Participants by market share, with or without the proposed 60%-40% split between Equities and Options Participants; any views on whether this would benefit or harm efficiency, competition and capital formation when compared to the Participants' proposal; and any views on whether there are other benefits or costs of adopting such an approach;

⁴⁴⁰ Section 11.2(b) of the CAT NMS Plan.

⁴⁴¹ Section 11.2(e) of the CAT NMS Plan.

11. Commenters' views on whether elements of the Participants' proposal entail cross-subsidization of activities (for example: allocating 60% of Participants' fees to Equities Participants and 40% to Options Participants is unlikely to reflect these groups' relative message traffic; and discounting fees associated with message traffic for market-making activities based on quote/trade ratios reduces fees paid by Industry Members who are market makers); any views on how these cross-subsidizations benefit or harm efficiency, competition, and capital formation; and any views on whether there are other benefits or costs of adopting such an approach;
12. Commenters' views on whether the lack of Industry Member participation on the Operating Committee prevents the Participants from arriving at an equitable allocation of CAT fees between Participants and Industry Members, and across members of those groups;
13. Commenters' views on how any inherent conflicts of interest may be addressed in the proposal;
14. Commenters' views on how allowing the Operating Committee to determine by vote how Participant fees are allocated across Participants would benefit or harm efficiency, competition, and capital formation, assuming that some proportion of CAT fees are to be allocated to Participants as a group; and any views on whether there are other benefits or costs of adopting such an approach;
15. Commenters' views on the proposed quarterly Participant CAT fee, including views on its calculation; any views on whether the proposed fee raises any competitive issues; and any views on whether the proposed fee is consistent with the funding principles expressed in the CAT NMS Plan, which state that the Operating Committee shall seek, among other things, "to create

transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company;”⁴⁴² “to establish an allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company resources and operations;”⁴⁴³ and “to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality;”⁴⁴⁴ and

16. Commenters’ views on the decision to use total budgeted costs for the CAT for the relevant year as the Total CAT Costs for calculating fees for Participants and Industry Members, rather than costs already incurred; views on the statement that the total budgeted costs for the CAT may be adjusted on a quarterly basis by the Operating Committee; and views on the treatment of any surpluses.

The Commission also requests that commenters provide analysis to support their views, if possible.

Interested persons are invited to submit written data, views, and arguments regarding whether the proposals should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person’s submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. Comments may be submitted by any of the following methods:

Electronic comments:

⁴⁴² Section 11.2(a) of the CAT NMS Plan.

⁴⁴³ Section 11.2(b) of the CAT NMS Plan.

⁴⁴⁴ Section 11.2(e) of the CAT NMS Plan.

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 4-698 on the subject line.

Paper comments:

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number 4-698. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the Participants' principal offices. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4-698 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁴⁵

⁴⁴⁵ 17 CFR 200.30-3(a)(85).

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021-15810 Filed: 7/23/2021 8:45 am; Publication Date: 7/26/2021]